No. 89-1632-CSY
Status: GRANTED

Title: California, Petitioner
v.
Hodari D.

Docketed:
April 18, 1990

Court: Court of Appeal of California,
First Appellate District

Counsel for petitioner: Niver,Ronald E.

Counsel for respondent: Lozenski,James L.

Entry	Date	Note	Proceedings and Orders
1	Apr 18 1990	G	Petition for writ of certiorari filed.
2	May 7 1990	D	Application (A89-779) for a stay pending disposition of petition for writ of certiorari, submitted to Justice O'Connor.
3	May 8 1990		Application (A89-779) denied by Justice O'Connor.
4	May 22 1990		DISTRIBUTED. June 7, 1990
5	Jun 5 1990	P	Response requested -- CJ. (Due July 5, 1990)
7	Jun 28 1990		Order extending time to file response to petition until July 31, 1990.
8	Jul 30 1990		Brief of respondent Hodari D. in opposition filed.
9	Jul 30 1990	G	Motion of respondent for leave to proceed in forma pauperis filed.
10	Aug 8 1990		REDISTRIBUTED. September 24, 1990
11	Oct 1 1990		Motion of respondent for leave to proceed in forma pauperis GRANTED.
12	Oct 1 1990		Petition GRANTED.
			**********
13	Oct 12 1990	G	Motion of respondent for appointment of counsel filed.
14	Oct 15 1990		DISTRIBUTED. Oct. 26, 1990.
15	Oct 29 1990		Motion for appointment of counsel GRANTED and it is ordered that James L. Lozenski, Esquire, of Berkeley, California, is appointed to serve as counsel for the respondent in this case.
20	Nov 14 1990		Brief amicus curiae of Appellate Committee of the CA District Attorneys Assoc. filed.
16	Nov 15 1990		Joint appendix filed.
17	Nov 15 1990		Brief of petitioner California filed.
18	Nov 15 1990		Brief amicus curiae of United States filed.
19	Nov 15 1990		Brief amicus curiae of Wayne County Prosecuting Attorney filed.
21	Nov 15 1990		Brief amicus curiae of Criminal Justice Legal Foundation filed.
23	Nov 23 1990		SET FOR ARGUMENT MONDAY, JANUARY 14, 1991. (2ND CASE)
25	Nov 23 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Nov 26 1990		Record filed.
		*	Certified copy of original record received.
26	Nov 29 1990		CIRCULATED.
27	Dec 3 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

No. 89-1632-CSY

Entry	Date	Note	Proceedings and Orders
28	Dec 17 1990	X	Brief amicus curiae of National Association of Defense Lawyers filed.
29	Dec 18 1990	X	Brief of respondent Hodari D. filed.
30	Dec 18 1990	X	Brief amicus curiae of Marvin Cahn filed.
32	Dec 18 1990	X	Brief amicus curiae of California Attorneys for Criminal Justice filed.
31	Dec 20 1990		2 Lodgings, tape and exhibit received.
33	Jan 4 1991	X	Reply brief of petitioner California filed.
34	Jan 14 1991		ARGUED.

89-1632

COPY

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No. 89--

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether physical restraint is required for the seizure of a person under the Fourth Amendment.
2. Whether a citizen who is pursued by a police officer on a public street may immunize himself from prosecution by discarding incriminating evidence and asserting that he did so out of fear of an unlawful search.

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No. 89–

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
HODARI D.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, which was entered on December 15, 1989.

OPINIONS BELOW

The opinion of the California Court of Appeal was reported at 216 Cal.App.3d 745, 265 Cal.Rptr. 79 (1989), but was withdrawn from publication by order of the California Supreme Court on March 15, 1990. A copy of the opinion is attached to this petition as Appendix A. The California Supreme Court denied review in this matter on March 15, 1990. A copy of the order of denial is attached to the petition as Appendix B.

JURISDICTION

The opinion of the California Court of Appeal was filed on December 15, 1989. The California Supreme Court denied review on March 15, 1990, at which time the opinion of the court of appeal became final and reviewable by this Court. California Rules of Court, rules 24(a), 25(a), 28(f). This petition for writ of certiorari followed within 90 days of the latter date. Supreme Court Rules, rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

A. Procedural History.

By a petition filed in the Alameda County Superior Court, sitting as a Juvenile Court, on April 20, 1988, it was alleged that respondent Hodari D. came within the provisions of California Welfare and Institutions Code section 602, in that he possessed cocaine, in violation of California Health and Safety Code section 11350. (CT 1).[1]

On May 2, 1988, respondent moved to suppress evidence under Welfare and Institutions Code section 700.1. (CT 12-18.) The juvenile court denied the motion on May 19, 1988. (CT 38.)

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1. "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript.

The jurisdictional hearing began on May 20, 1988. The court found the allegations of the petition to be true on the same day. (CT 39.)

On June 6, 1988, the court continued a previous wardship and ordered that respondent be placed in an appropriate county facility for a maximum period of five years and eight months. (CT 50-52.)

On December 15, 1989, the California Court of Appeal, First Appellate District, reversed the judgment of wardship, finding that the only evidence supporting the petition had been obtained as a result of an illegal search and seizure directed at respondent. 265 Cal.Rptr. 79 (1989). On March 15, 1990, the California Supreme Court denied petitioner's application for review.

B. Statement of the Facts.

On April 18, 1988, at 10:00 p.m., Officers Brian McColgin and Jerry Pertoso of the Oakland Police Department's Drug Task Force were on patrol in the vicinity of Foothill Boulevard and 64th Avenue, when they saw four young men standing on the right side of a red car parked at the curb. The youths saw the officers and ran away even before the officers had stopped. Two of the youths ran southward toward the rear of an apartment complex located at 2663-63rd Avenue; the other two ran westward to the rear of an abandoned, burned-out house at 2665-63rd Avenue. The car drove away, proceeding southbound on 63rd Avenue at "a high rate of speed." When the car and the youths left the area, the officers were about 40 yards away from them. The driver, Officer

McColgin, did not activate his emergency equipment. (RT 1-4; 11-13.)

Officer McColgin drove to the place where the red car had been parked. Officer Pertoso left the patrol unit, ran northward back to Foothill Boulevard, and then westbound along that street. Officer McColgin testified that the reason for their pursuit was that "we believed that there was some type of illegal [narcotics-related] activity occurring there" and "[w]e wanted to stop the individuals who had run and find out who they were and what their purpose was for being there in the area." (RT 4.)

As Officer Pertoso ran along Foothill Boulevard, he saw respondent Hodari D. "running northbound toward me but he was looking over his shoulder as if to be looking for someone to follow him." (RT 14.) As respondent arrived at a point about 11 feet from the

officer, he turned forward, saw the officer, and "had a startled look on his face." (RT 18.) Then, "in an underhand scooping motion with the right hand, [respondent] discarded a single loose rock to the sidewalk along the side of the house." (RT 15.) The officer had not said or done anything other than "to be where he was." (RT 15.) Officer Pertoso stopped respondent, forced him to the ground, and handcuffed him. (RT 15.) Less than a minute passed between Pertoso's initial observation of respondent and the latter's discarding of the rock of cocaine. (RT 16.)

REASONS FOR GRANTING THE WRIT

This case presents a factual scenario which occurs almost every day in this Nation's urban areas. A youth, sensing a police presence on the street, runs away. The police, curious about the reasons for the flight, follow him.

Fearing detention and search, the youth throws away his stash in the hope that the police will not detect it. But the officer picks up the contraband and arrests the youth. Thus completes the familiar chronology of recognition, flight, chase, abandonment, and apprehension.

The court of appeal made the following points. (1) Chasing a person on a public street implicates the provisions of the Fourth Amendment; physical restraint is not a necessary element of a seizure. (2) The act of running from police, who had done nothing to provoke flight, is insufficient cause for pursuit. (3) Incriminating evidence abandoned in the face of police pursuit is the fruit of the poisonous tree. The court of appeal thus declared that a police officer may not lawfully pursue -- or even run toward -- a citizen without specific cause to believe that he has committed a crime; if the officer does,

the citizen may immunize himself from prosecution by openly discarding anything in his possession, be it marijuana, cocaine, or a knife or gun. This view of the Fourth Amendment has given street criminals an unjustified and preemptive form of protection and has taken from police a necessary means to investigate suspicious behavior. Further, this construction is at odds with this Court's decision in *Brower* v. *County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628 (1989).

The opinion below contains two critical errors, both of national significance. First, the court held that a person running from a police officer has been seized within the meaning of the Fourth Amendment despite the officer's lack of control over the fleeing person. This conclusion turns the concept of seizure on its head. Seizure denotes physical control. If a person runs from a

police officer, it is a fiction, both physically and constitutionally, to assert that the person is seized. Seizure does not occur until the fleeing suspect has been physically restrained.

Second, the court of appeal held that the abandonment of incriminating evidence by a person fleeing from a police officer is the result of the chase. But this Court unmistakably declared in *Brower* that evidence discarded by a fleeing citizen is not a seizure within the meaning of the Fourth Amendment. The position which this Court adopted in *Brower* reflects a realistic assessment of the relationship between police and citizens on the streets of this Nation and works no injustice toward those who truly fear the possibility of becoming the target of an unlawful search. The court of appeal adduced no evidence to support its premise,

essential to the viability of its analysis, that police officers search every person whom they detain, even unlawfully. In the absence of evidence that a pursuing officer intends to search a prospective detainee, *Brower* is clearly correct in concluding that a reasonable person about to be detained does not justifiably fear the additional intrusion of a search.

Nor does *Brower* leave unprotected those who fear that they will be searched. If they are searched unlawfully, the fruits of the illegal police conduct will be suppressed. *Brower* merely advises persons who possess incriminating evidence that the Fourth Amendment will not protect them if they engage in self-help, a remedy not legitimized by the Exclusionary Rule.

It bears repeating that the facts of this case are typical of confrontations which occur almost daily in this

Nation. We respectfully suggest that it is time for this Court to provide definitive guidance to the police and citizens who find themselves participants in such an encounter.

ARGUMENT

I.

A PERSON FLEEING FROM THE PRESENCE OF A POLICE OFFICER IS NOT RESTRAINED WITHIN THE MEANING OF THE FOURTH AMENDMENT.

The California Court of Appeal made the following points in concluding that a fleeing citizen can protect himself from prosecution by discarding incriminating evidence: (1) a pursuit of a person in a public area by a police officer is a seizure of that person; there is "no requirement of physical restraint prior to a finding that a detention has occurred" *In re Hodari D.*, 265 CalRptr. 79,

84 (1989) (fn. omitted); (2) "[f]light alone . . . is insufficient to justify a detention" (*ibid.*); (3) when an officer attempts to detain a suspect by chasing him, "we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality" (*id.* at 85). With this syllogism the court created a brand new constitutional right: the right of a person who fears detention by a police officer to immunize himself from prosecution by discarding incriminating evidence on his person. The opinion of the court of appeal, however, is based upon two fundamental misconceptions, either of which requires reversal of its judgment. First, when a citizen exercises his constitutional right to leave the vicinity of a police officer, the former is not detained until the latter has forcibly restrained him. Second, even if one is unlawfully

detained, absent an official demand for disclosure or other manifestation of intent to search, the detainee's attempt to discard or hide any incriminating evidence attentuates the connection between the prior illegality and the subsequent recovery of the evidence.

In *Terry* v. *Ohio*, 392 U.S. 1, 19 n. 16 (1968), the Court stated, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." In *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980), two Justices of the Court clarified this requirement by stating that a person is seized, within the meaning of the Fourth Amendment, "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554 (fn. omitted)

(Opinion of Stewart, J.). The Court subsequently adopted this formulation. *See Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988); *INS* v. *Delgado*, 466 U.S. 210, 215 (1984).

This test is imprecise because it assesses the coercive effect of police conduct, taken as a whole, instead of focusing in isolation on discrete details of the police activity. *Michigan* v. *Chesternut*, 486 U.S. at 573. Further, although the test is characterized as "objective," "allow[ing] the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment" (*id.* at 574), the Court, and only the Court, can decide whether a reasonable person would have felt free to leave. This determination is based on a host of factors which a police officer must evaluate in a matter of seconds. "[W]hat constitutes a restraint on liberty . . . will vary, not only with the particular police conduct at issue,

but also with the setting in which the conduct occurs." *Id.* at 573. Thus, because an officer will not know whether a given set of facts will constitute a restraint until the Court so declares, we respectfully submit that it is inaccurate to conclude that the *Mendenhall* objective standard provides a reliable predictor for the officer in the street.[2]

2. A related area of Fourth Amendment jurisprudence illuminates the difficulties which an open-ended formulation poses for a police officer. In *Katz* v. *United States*, 389 U.S. 347 (1967), the Court redefined the elements of a search, discarding the standard of "constitutionally protected area" in favor of a "reasonable expectation of privacy." Compare *id.* at 353, *with* 361 (Harlan, J., concurring). Although the *Katz* formulation is more sensitive to privacy concerns in this age of high technology, it has not provided a standard to predict when this Court will decide that a search has occurred. *See Florida* v. *Riley*, ___ U.S. ___, 102 L.Ed.2d 835 (1989); *California* v. *Greenwood*, 486 U.S. 35 (1988); *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986); *California* v. *Ciraolo*, 476 U.S. 207 (1986). Perhaps for that reason, the Court has emphasized that it has not altogether abandoned the familiar points of reference provided by property concepts in determining whether official conduct constitutes a search. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n. 12 (1978).

Application of the *Mendenhall* test to the facts of this case demonstrates the limited utility of that standard in certain contexts. Specifically, the question whether a reasonable person would have believed that he was not free to leave necessarily assumes that he has *not* left. That is, the factual predicate for application of the *Mendenhall* test is stationary acquiescence to the officer's show of authority. Seizure denotes "an intentional acquisition of physical control." *Brower* v. *County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628, 635 (1989). Where, as here, the citizen has exercised his right to leave by running away, the *Mendenhall* test can have no relevance. The citizen is not under the officer's physical control. We

must look elsewhere for guidance to determine whether a seizure has occurred.[3]/

We return to *Terry*, which characterized a seizure as restraint by "physical force *or* a show of authority. . . ." 392 U.S. at 19 n. 16 (emphasis added). Because respondent did not acquiesce to any display of authority, we consider the alternative of physical force. Just as property concepts are relevant to a determination whether a search has occurred (*Rakas* v. *Illinois*, *supra*), so the indicia of physical restraint provide useful guidance to decide whether a seizure has taken place. We can think

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3. In *Chesternut*, of course, the defendant neither stopped nor fled. Applying the *Mendenhall* standard, the Court unanimously held that he had not been seized. The Court had no occasion to address the question whether flight is inconsistent with the proposition that a seizure has occurred. For the reasons stated in the text, *Mendenhall* cannot answer this question. Had the Court in *Chesternut* applied the formulation advanced in the concurring opinion (486 U.S. at 576-577), it would have reached the same result.

of no case decided by this Court which would have been resolved differently if this Court has applied this test. *E.g. United States* v. *Sokolow*, ___ U.S. ___, 104 L.Ed.2d 1 (1989); *Florida* v. *Royer*, 460 U.S. 491 (1983) (seized belongings; transported to police room); *Reid* v. *Georgia*, 448 U.S. 438 (1980) (returned to terminal with officers); *Adams* v. *Williams*, 407 U.S. 143 (1972) (officer standing next to door of car in which defendant was sitting). It is therefore entirely consistent with this Court's cases and faithful to the language and spirit of the Fourth Amendment to require physical control as an element of a seizure when the citizen has not acquiesced in an express or implicit show of authority. *See Brower* v. *County of Inyo*, *supra*.

Judged by this analysis, respondent had not been seized at the time he discarded the rock of cocaine. His

flight upon observing the police car manifested an assertion of his right to leave the area. That assertion did not terminate until he came within the physical control of the pursuing officer. The trial court found that he was not physically restrained at the moment he abandoned the cocaine. (RT 55; 265 Cal.Rptr. at 81 n.2) This finding is clearly supported by the evidence that the officer was 11 feet away from respondent, had not drawn a gun, had not flashed a badge, had not told respondent to stop, or otherwise had caused "a governmental termination of freedom of movement *through means intentionally applied*." *Brower* v. *County of Inyo*, 103 L.Ed.2d at 635. The officer's mobile presence[4/] on the street was not an

4. In the view of the court of appeal, the dispositive fact in finding a detention was that the officer was running toward respondent. 265 Cal.Rptr. at 82 n.2, 83, 84 n. 4. It may be inferred that the court would have reached the opposite result if the officer had walked toward appellant. Thus, according to the court of appeal, the Fourth

intentional application of restraining force. Therefore there was no seizure.

II.

RESPONDENT VOLUNTARILY ABANDONED THE EVIDENCE ON THE STREET.

Wholly aside from its conclusion that a person in flight has been seized, we find additional reason to disagree with the court of appeal. The court held that the abandonment of the rock of cocaine was the direct result of the attempted unlawful seizure -- the fruit of the poisonous tree. *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The court stated that where police illegally attempt to stop a fleeing suspect, "we cannot see how the suspect's immediate discard of contraband can be anything

Amendment required the officer to decelerate when he saw respondent, even if he was physically unable to do so. Surely the scope of the right of privacy is not dependent upon the athletic talents of our law enforcement officers.

other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer's stated purpose in pursuing [respondent] was to stop him because of a hunch that illegal narcotic activity had taken place. . . . [Respondent's] act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence. [Citations omitted.] To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction." *In re Hodari D.*, 265 Cal.Rptr. at 85-86. Petitioner submits that despite the obligatory inclusion of the word "exploitation" in the above quotation, the state court actually applied the "but for" test expressly rejected in *Wong Sun*.

In *Wong Sun*, of course, this Court declared that "the more apt question is 'whether, granting establishment of the primary illegality, the evidence to which instant

objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" 371 U.S. at 488. Evidence which a defendant challenges must be the product of some illegal governmental activity (*United States* v. *Crews*, 445 U.S. 463, 471 [1980]), and he must demonstrate an exploitative nexus between the illegality and the challenged evidence. *Alderman* v. *United States*, 394 U.S. 165, 183 (1969). Petitioner submits that this Court's opinion in *Brower* v. *County of Inyo, supra*, forecloses the argument that the voluntary abandonment of contraband is the product of an exploitation of an attempted unlawful detention.

In *Brower*, the Court defined a seizure as "a government termination of freedom of movement *through means intentionally applied.*" 103 L.Ed.2d at 635

(emphasis in original). The Court then provided an example of what is not a seizure -- an example which is dispositive of this issue. The Court relied upon its earlier decision in *Hester* v. *United States*, 265 U.S. 57 (1924):

> "where an armed revenue agent had pursued the defendant and his accomplice after seeing them obtain containers thought to be filled with 'moon shine whiskey.' During their flight they dropped the containers, which the agent recovered. The defendant sought to suppress testimony concerning the containers' contents as the product of an unlawful seizure. Justice Holmes, speaking for a unanimous Court, concluded: 'The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle - and there was no seizure in the sense of the law when the officers examined the contents of each after they had been abandoned.' (*Id.*, at 58 44 S.Ct. at 446.) Thus even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action by the police the Court held that no seizure had

> taken place. It would have been quite different, of course, if the revenue agent had shouted 'Stop and, give us those bottles in the name of the law!' and the defendant and his accomplice complied. Then the taking of possession would have been not merely the result of governmental action but the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred." 103 L.Ed.2d at 636.

We acknowledge that in this case the taking was the result of governmental action, for respondent indisputably abandoned the rock in reaction to the approaching officer. But we dispute that the abandonment was the result of "the very means . . . that the government selected. . . ."

To begin with, there is absolutely no evidence in the record that the officer intended to search respondent once he caught him. It is one thing to detain -- or threaten to detain -- a person on the street; it is quite another matter

to commit the additional intrusion of searching him for weapons. To do so, the police officer "must be able to point to specific and articulable facts" which indicate that the detainee was armed and dangerous. *Terry* v. *Ohio*, 392 U.S. at 21, 30; *Adams* v. *Williams*, 407 U.S. at 146. If a police officer intends to detain a person on the street, even illegally, it does not follow that he will commit the additional intrusion of conducting a pat search, let alone a search sufficiently intense to uncover a rock of cocaine.

Second, even if the officer did plan to seize evidence, he did not order respondent to drop the rock of cocaine. By hypothesis the officer would have found it by conducting a search after the detention. But the abandonment of the cocaine was not the means of discovery selected by the government.

The Court has recognized that "'an intervening independent act of a free will'" may attenuate the connection between an illegality and the discovery of evidence so as to dissipate any taint. *Wong Sun* v. *United States*, 371 U.S. at 486, 491. *Brower* stands for the proposition that, as a matter of Fourth Amendment jurisprudence, abandonment of incriminating evidence by a fleeing citizen is a voluntary act, a supervening event which breaks the causal chain between chase and recovery.[5]

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5. Cases in California are in hopeless disarray. As the court of appeal noted, two reported decisions are consistent with its reasoning. (*People* v. *Menifee*, 100 Cal.App.3d 235, 160 Cal.Rptr. 682 [1979]; *People* v. *Washington*, 192 Cal.App.3d 1120, 238 Cal.Rptr. 840 [1987]); two other cases reject the court's nexus analysis (*People* v. *Patrick*, 135 Cal.App.3d 290, 185 Cal.Rptr. 325 [1982]; *People* v. *Holloway*, 176 Cal.App.3d 150, 221 Cal.Rptr. 394 [1985]). Since the decision in this case, two other cases have followed it (*People* v. *Salgado*, 218 Cal.App.3d 300, 266 Cal.Rptr. 887 [1990]; *People* v. *Rayboum*, 218 Cal.App.3d 308, 266 Cal.Rptr. 884 [1990]), while one has rejected it (*In re Christopher Leon B.*, 1990

The state court of appeal suggested that suppression was necessary to deter police misconduct in the form of chasing citizens on the street without justification. 265 Cal.Rptr. at 86. Petitioner has two responses. First, the remedy is disproportionate to the perceived evil. An unlawful arrest does not require the abatement of prosecution. *United States* v. *Crews*, 445 U.S. at 474. *A fortiori*, an attempted illegal detention should not produce this result in the absence of evidence of an attempt to

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Cal.App. LEXIS 268.) The California Supreme Court has ordered "depublished" two cases which took contrary views on the issue: the instant case and *People* v. *Martinez*, 239 Cal.Rptr. 433 (1987).

Confusion about the applicable rule is reflected in the majority and dissenting opinions in *State* v. *Lemmon*, 568 A.2d 48 (Md. 1990) and in the incredulous analysis of one commentator who does not believe that *Brower* means what it apparently says. 3 La Fave, Search and Seizure § 9.2(h), pp. 39-40 (2d Ed. 1987, Supp. 1990). The suggestion of the concurring opinion in *Brower* that "its dicta seem designed to decide a number of cases not before the Court" (103 L.Ed.2d at 637 [Stevens, J., concurring]) seems to have gone unheeded so far.

search. Second, respondent or any other similarly situated citizen is not without redress if he is unlawfully detained and searched. His suppression motion would be granted and he would go free. But respondent chose to engage in self-help by trying to discard the cocaine without detection. The Constitution does not always protect a person from the legal consequences of an unwise choice. *Cf. McGautha* v. *California*, 402 U.S. 183, 213 (1971). *Brower* teaches that the consequence of respondent's decision was the discovery of admissible evidence.

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for Certiorari to the California Court of Appeal for the First Appellate District be granted.

DATED: April 17, 1990

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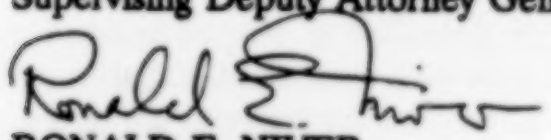

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APPENDICES

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re HODARI D., a Person Coming Under the Juvenile Court Law.	
PEOPLE OF THE STATE CALIFORNIA, Plaintiff and Respondent, v. HODARI D., Defendant and Appellant.	A043060 (Alameda County Super.Ct.No. 141401)

Hodari D., a minor, appeals from the juvenile court's order finding that he was in possession of cocaine and that he violated the curfew restrictions of his probation. We determine that the court erred in failing to suppress evidence obtained as a direct result of illegal police activity, and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On April 18, 1988, at approximately 10 p.m., Officer McColgin and Pertoso, assigned to a special duty drug task force, were on patrol in the area of Foothill Boulevard and 63rd Avenue in Oakland. They drove an

unmarked brown Dodge, and both officers wore blue jeans, tennis shoes, and blue jackets with the word "police" on the front and back. As the officers turned south onto 63rd Avenue, they saw four or five young Black males standing around a small red compact car parked at the curb approximately 40 yards away. Two members of the group looked at the Dodge and almost immediately started running west toward an apartment complex. The red vehicle drove off quickly and the other two individuals ran south on 63rd Avenue toward an abandoned house next to the apartments.

The officers were familiar with the apartment complex as an area of high narcotic activity in which they had made several arrests. There was no information as to whether any convictions had resulted from the arrests. By the time the officers pulled up to where the red vehicle had been parked, all of the individuals were out of sight. The officers did not see their faces, nor did they see any exchange of drugs, money, or any other furtive movements, but they believed there was "some type of illegal [narcotics-related] activity" taking place.

Officer Pertoso got out of his car and ran back up 63rd Avenue, turning west on Foothill to cut off the fleeing individuals to "find out who they were and what

their purpose was for being there in the area." Officer McColgin drove around the block in the opposite direction, also attempting to stop the individuals. As Pertoso ran westbound along Foothill, he saw appellant running towards him, looking back over his shoulder. Pertoso and appellant continued to run until they were approximately 11 feet apart, when appellant turned forward, saw the officer, and looked startled. Appellant then made a scooping motion with his hand, and discarded a single loose rock on the sidewalk. Pertoso suspected the rock was cocaine.

Pertoso apprehended appellant, forced him to the grass, handcuffed him, and radioed McColgin. McColgin arrived on the scene and retraced the route back to where the officers had originally seen the group. He found a baggie containing 15 chunks of what later proved to be cocaine near the apartment complex.[1/]

On April 20, 1988, a subsequent petition under Welfare and Institutions Code section 602 was filed against appellant alleging possession of cocaine. (Health & Saf. Code, § 11350.) A supplemental petition alleged a curfew violation. (Welf. & Inst. Code, § 777, subd. (a).)

---

1. In a search incident to the arrest, police discovered $130 in appellant's shoe and a pager.

On May 2, 1988, appellant filed a motion to suppress all evidence seized as a result of his detention. (Welf. & Inst. Code § 700.1.) On May 19, the motion was denied. The court subsequently found the allegations of the petitions to be true.

At the dispositional hearing on June 6, appellant was ordered committed to Los Cerros Camp. A timely notice of appeal was filed on June 13, 1988.

DISCUSSION

On appeal, appellant challenges the court's suppression order, arguing that the cocaine should have been suppressed because the chase constituted a detention and the officers had no reasonable cause to detain appellant. Respondent argues that there was no detention until the officers caught appellant, and that absent an illegal police threat to search, as opposed to a threat to detain, appellant's discard of the cocaine is not a result of a threatened illegality.

The trial court's findings and reasoning were not entirely clear. The court stated: "I'm not concerned with the illegality of the chase on these facts. I think this was clearly illegal. The cops had no reasonable basis for

doing what they did in chasing him."[2/] The court's concern was with the issue of whether, granting the initial illegality, "[A]m I required to find that anything that was disposed of . . . that's suppressible?" The trial court found it illogical that discarded evidence should be suppressed, even though the court felt that the evidence would have been suppressed if appellant left it in his pocket and the police discovered it during a search following appellant's apprehension. It appears that the court's main concern was with the nexus between the illegality and the evidence, rather than the issue of whether there was illegal police conduct. We approach the issue as a three-part inquiry into whether a detention occurred, if there was reasonable cause for detention, and

---

2. The trial court noted that there was no "actual detention" until after appellant discarded the rock. The court was distinguishing between threatened detentions and actual, physical detentions. The court also stated, however, that the police had no right to chase appellant or to detain him. Under the facts of this case, as compared to cases in which an officer merely follows a suspect, we find there was an actual detention, for Fourth Amendment purposes, when the officer confronted appellant head on at a run, as at that point, the officer communicate an intent to capture or block appellant's freedom of movement. (Michigan v. Chesternut (1988) 486 U.S. ___, ___ [108 S.Ct. 1975, 1980].)

whether abandonment of the evidence was a direct result of an illegal detention.

Was There a Detention?

We apply federal law, but utilize state law where it does not conflict with federal law in evaluating the issues involved. (In re Lance W. (1985) 37 Cal.3d 873.) In reviewing a motion to suppress, we accept the factual finding of the trial court which are supported by substantial evidence, but we independently determine whether the facts conform to the constitutional standards of reasonableness. (People v. Leyba (1981) 29 Cal.3d 591, 596-597.) Since only the police officers testified in this case, the facts are undisputed.

Both parties correctly cite Michigan v. Chesternut, supra, 486 U.S. ___ [108 S.Ct. 1975] as the most recent Supreme Court case analyzing when police conduct constitutes a detention. In Chesternut, officers in a patrol car observed a man get out of a car and approach the defendant. When defendant saw the officers, he turned and ran. The patrol car followed, "'to see where he was going.'" As the car drove alongside, defendant discarded several packets containing codeine. (Id., 108 S.Ct. at p. 1977.)

The court noted it would "leave to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980, fn. 9.) The court also declined to adopt a rule that "a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." (Id., at p. 1979.) Instead, the court reaffirmed the test of United States v. Mendenhall (1980) 446 U.S. 544, that "the police can be said to have seized an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' [Citations]." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1979.) The test is designed to "assess the coercive effect of police conduct, taken as a whole, ..." (Ibid.)

In evaluating the facts of Chesternut, the Supreme Court noted that the police conduct in that case "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980.) There was no use of siren or flashers, no command to halt, and no

operation of the police car to block the suspect's course, "or otherwise control the direction or speed of his movement." (Ibid.) The court also noted that mere surveillance or approach by an officer is not a seizure. (Id., at pp. 1980-1981.) The court left open the question of when police pursuit would constitute a seizure. (Id., at p. 1980, fn. 9.)

In the instant case, appellant alludes to the coercive nature of the police action of engaging in an aggressive foot chase to cut off his flight and of sending an officer in each direction. Of course, appellant had disappeared by the time Officer Pertoso got out of the car, and thus had no knowledge of this police pincer maneuver. In fact, appellant never saw Officer McColgin until after he was under arrest. Police conduct of which the suspect is unaware is not relevant to a Fourth Amendment analysis. (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980, fn. 7.) The only police conduct with which we are concerned in the instant case is that of Officer Pertoso as he ran up Foothill Boulevard toward appellant, from the time appellant, who was also running, looked forward and saw the officer running directly at him.

We have no doubt that it is coercive and intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk. Indeed, the sight of a running officer, even without a command to halt, would reasonably convince most citizens that they were not free to ignore the officer and leave. We disagree with the trial court that there was no detention until the officer physically gained control of the suspect. This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion as to cut him off and confront him head on. Under the rationale of Chesternut, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or "otherwise control the direction or speed" of one's movement. (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1080.)

California cases and federal cases have held that giving chase "in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention." (People v. Washington (1987) 192 Cal.App.3d 1120, 1126; People v. Menifee (1979) 100 Cal.App.3d 235, 239 [officer's rapid pursuit of suspects who knew the officers could be reasonably viewed as an intended

detention]; United States v. Bowles (5th Cir. 1980) 625 F.2d 526, 532 [officer in pursuit of suspect who passes him, turns to face him and holds out credentials has restrained the suspect].) A citizen has the right to leave at the approach of police, and when the officer takes action to prevent a citizen's exit, the officer has restrained the citizen's freedom of movement. (People v. Washington, supra, 192 Cal.App.3d 1120, 1125-1126.)

Respondent contends that by its citation of Hester v. United States (1924) 265 U.S. 57 in Brower v. County of Inyo (1989) 489 U.S. ___ [109 S.Ct. 1378], a civil rights case, the Supreme Court has adopted the suggestion of two justices in Chesternut that there can be no detention until a fleeing suspect is actually caught.[3]

3. The language referred to in Chesternut is: "It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1981.) If this statement refers to a requirement of physical restraint, it would be contrary to many years of Supreme Court precedent stating that no physical restraint is necessary to constitute a detention. (Adams v. Williams (1972) 407 U.S. 143, 146 [involuntary rolling down of vehicle window in response to officer's request denoted a "forcible stop"]; Terry v. Ohio (1967) 392 U.S. 1, 19, fn. 16 ["[o]nly when the officer, by means

(Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1081, Kennedy J., concurring, joined by Scalia, J.) We do not find that conclusion is compelled by Brower. In Hester, defendant and an accomplice were under surveillance as a result of an informant's tip. Officers saw the accomplice hand defendant a quart bottle, at which point the court stated: "An alarm was given." (Hester v. United States, supra, 265 U.S. 57, 58.) Defendant grabbed a gallon jug and fled with the accomplice. An officer pursued, and the two men dropped the bottles, which the officers recognized as containing illegal whiskey. It appears from these facts that the officers in Hester had at least a reasonable suspicion, having lawfully witnessed the transaction with the bottles, which would have justified a detention prior to defendant's flight. The case has no application to illegal detentions, nor does it purport to define what constitutes a detention, but merely states that there was no seizure when the officers inspected the bottles.

The Brower court's purpose in citing Hester was to illustrate its statement that the term "seizure" could not

of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."].)

be applied to an unknowing act, but must be the result of government means "intentionally applied." (Brower v. County of Inyo, supra, 109 S.Ct. 1378, 1381.) The court was considering a case in which a fleeing suspect had been killed when his car crashed into a police roadblock. The lower court had concluded that the death was caused by the suspect's voluntary act of failing to stop. The Supreme Court stated that this "decision to continue the chase" could not eliminate the county's responsibility for termination of his movement. (Id., at p. 1380.) The court concluded that use of the roadblock to stop the car was a seizure. We find no application to the instant case, and no requirement of physical restraint prior to a finding that a detention has occurred.[4/] We conclude, on the facts of this case, that there was a detention, and that the detention began as soon as appellant saw the officer running toward him.

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4. Even if physical seizure were required, we believe that the facts of the instant case illustrate a situation tantamount to a physical seizure. Appellant, who was running down the sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a jacket marked "police," who was 11 feet away and running toward him.

Reasonable Cause to Detain

The trial court concluded that the police had no reasonable cause to detain appellant prior to his discard of the drugs. Respondent does not dispute the trial court's finding that the police had no reasonable cause to chase or detain appellant, choosing to rest on the argument that there was no detention. The trial court's decision on this issue is supported by the law.

Initially, we note that the fact of appellant's flight at the sight of the officers is sometimes relevant in assessing the existence of an officer's reasonable suspicion, where, as here, the flight is not triggered by an illegal act on the part of the officer. (3 LaFave, Search and Seizure (2d Ed. 1987) § 9.3(c), p. 449, fn. 150, citing Commonwealth v. Thibeau (1981) 429 N.E.2d 1009.) Flight alone, however, is insufficient to justify a detention. (People v. Aldridge (1984) 35 Cal.3d 473, 478.) "If the right to be free from unjustified detention is lost merely by seeking to avoid such encounters, then the right is meaningless; it would exist only to the extent it was not exercised." (People v. Bower (1979) 24 Cal.3d 638, 649 [fact that appellant, white, observed by police with a group of blacks, started moving hurriedly away raises no inference of criminal activity]; Wong Sun v. United States

(1963) 371 U.S. 471, 482-483 [suspect's flight from narcotics officer at door does not justify otherwise illegal police action].) Flight coupled with other "specific knowledge on the part of the officer relating the suspect to the evidence of crime" may be considered in assessing an officer's actions. (Sibron v. New York (1968) 392 U.S. 40, 66-67.) Thus, the fact that appellant ran away can support a detention only when coupled with other specific knowledge.

The only other factor known to the officers in the instant case at the time was that the address where the red car was parked was an area of high narcotic activity. The hour (10:30 p.m.) was not unusually late; the officers observed no exchange of drugs or money; there was no Vehicle Code violation observed; and the officers did not recognize any of the people standing near the car. The factors of nighttime, high drug activity in the area, and seeking to avoid police were held insufficient to justify a detention in People v. Aldridge, supra, 35 Cal.3d 473, 478. We must conclude that the facts known to the officers in the instant case at the time they began to chase appellant, and when appellant became aware of the effort to stop him, did not constitute "'. . . specific and articulable facts causing [the officers] to suspect that (1)

some activity relating to crime has taken place or is occurring or about to occur, and (2) the person [the officers] intend[] to stop or detain is involved in that activity. . . .'" (People v. Aldridge, supra, 35 Cal.3d 473, 478; In re Tony C. (1978) 21 Cal.3d 888, 893.)

Link Between Abandonment of the Cocaine and the Illegality

Finding that appellant was detained without a reasonable suspicion of criminal activity does not end our inquiry. Not all evidence obtained through illegal police action must be excluded. (Wong Sun v. United States, supra, 371 U.S. 471, 487-488.) The test is not whether the evidence would have come to light but for the illegality, but if the evidence was obtained as a direct result, or exploitation of the illegality. If the evidence was obtained by sufficiently independent means, or an intervening independent act of the defendant, the "taint" of illegality is said to have been purged. (Ibid; People v. Lee (1986) 186 Cal.App.3d 743, 751.)

Respondent argues that appellant failed to show a nexus between the police action and the evidence, as there was no showing that the police intended to search him as opposed to merely detaining him. Respondent

disputes our analysis in People v. Menifee, supra, 100 Cal.App.3d 235, and the holding in People v. Washington, supra, 192 Cal.App.3d 1120, and cites two opposing cases as the correct analysis of the nexus requirement. (People v. Patrick (1982) 135 Cal.App.3d 290; People v. Holloway (1985) 176 Cal.App.3d 150.) The latter two cases conclude that absent a police threat of an illegal search, evidence that is abandoned by a fleeing suspect is the product of a voluntary act rather than a product of an illegal detention. We cannot agree that the illegality involved must be a search in order for discovered evidence to be suppressed as a direct result or exploitation of the illegality.

"[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation -- whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the curse of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." (United States v. Crews (1980) 445 U.S. 463, 470, fns. omitted.) Factors to be considered in determining whether evidence is a product of police illegality include whether the evidence was obtained as a product of the defendant's free will, the temporal

proximity of the illegality to the discovery of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. (Brown v. Illinois (1975) 422 U.S. 590, 603-604 [considering whether a confession was obtained by exploitation of an illegal arrest].) None of these factors require a showing of an illegal search as the triggering illegality, as opposed to an illegal arrest or detention.

Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer's stated purpose in pursuing appellant was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's acts were unfounded, as he admitted he originally saw nothing suspicious other than the four Black youths standing near a car. Appellant's act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence. (United States v. Pirolli (11th Cir. 1982) 673 F.2d 1200, 1204 [abandonment that is the product of police misconduct is not voluntary]; United States v. Beck (5th Cir. 1979) 602 F.2d 726, 730 [throwing marijuana out car

window not voluntary abandonment after officer had pulled police car in front of defendant's parked vehicle].) To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction.

The purpose of the exclusionary rule to deter illegal police conduct is served by our decision. "Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such Fourth Amendment violations in future cases." (4 LaFave, Search and Seizure, op. cit. supra, § 11.4(j), pp. 459-460.) If the police had no legal ground to obstruct appellant's path, exclusion of the evidence obtained as a direct result of that action serves to deter the repetition of such unfounded detentions.

We adhere to the analysis mandated by Wong Sun, Crews, and Brown, and determine that the challenged evidence was obtained as a direct result of the

illegal detention. The trial court erred in ruling that the evidence was admissible in the action below.

The order appealed from is reversed.

CERTIFIED FOR PUBLICATION

Racanelli, P.J.

We concur:

Nesom, J.

Stein, J.

Trial Court: Superior Court, County of Alameda

Trial Judge: Hon. Wilmont Sweeney

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AO43060
In re Hodari D.

FILED December 15, 1989
Court of Appeal - First App. Dist.
Ron D. Barrow, Court Clerk

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division One, No. A043060

S013842

IN THE SUPREME COURT OF STATE OF CALIFORNIA

IN BANK

In Re HODARI D., A Person Coming Under the Juvenile Court Law

THE PEOPLE, Respondent

v.

HODARI D., Appellant

Respondent's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed December 15, 1989, which appears at 216 Cal.App.3d 745. (Cal. Const., Art.VI, Section 14; Rule 976, Cal. Rules of Court.)

LUCAS
Chief Justice

SUPREME COURT
Filed March 15, 1990
Robert Wandruff Clerk

RESPONSE REQUESTED

ORIGINAL

(2)

No. 89-1632

Supreme Court, U.S.
FILED
JUL 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an actual physical restraint is required for a detention.

2. Whether evidence abandoned upon an illegal detention must be suppressed.

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No. 89-1632

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully prays that the writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, which was entered on December 15, 1989, be denied.

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District was reported at 216 Cal.App.3d 745, 265 Cal.Rptr. 79 (1989). A copy of the opinion is attached to the petition for writ of certiorari as Appendix A.

On March 15, 1990, the California Supreme Court denied review of the opinion but ordered the opinion to be depublished. A copy of the order of denial is attached to the petition for writ of certiorari as Appendix B.

JURISDICTION

The California Supreme Court denied review of the Court of Appeal decision on March 15, 1990. Under California Rules of Court sections 24(a), 25(a) and 28(f), the Court of Appeal opinion then became final and reviewable by this Court.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

STATEMENT OF THE CASE

A. Procedural History

On April 20, 1988, a petition was filed in Alameda County Superior Court, sitting as a Juvenile Court, charging respondent with a violation of California Health and Safety Code section 11350 (possession of cocaine for sale). (Clerk's Transcript (CT) 1, 2.)

On May 2, 1988, respondent filed a motion under California Welfare and Institutions Code section 700.1 to suppress all physical evidence seized as a result of his detention. (CT 17, 18.)

On May 19, 1988, respondent's motion to suppress was denied. (Reporter's Transcript (RT) 38.) Subsequently, the juvenile court found the alleged violation of Health and Safety Code section 11350 to be true (CT 39), continued a previous wardship and ordered that respondent be placed in an appropriate county facility. (CT 50-52.)

On December 15, 1989, the California Court of Appeal, First Appellate District, in a published opinion, reversed the judgment of the juvenile court. The Court of Appeal found that the evidence offered in support of the petition had been obtained as the result of the illegal search and seizure of respondent. A copy of opinion is attached to the petition for writ of certiorari as Appendix A.

On March 15, 1990, the Supreme Court of the State of California denied petitioner's application for review and ordered the opinion not to be published in the official reports. A copy of the order is attached to the petition

for writ of certiorari as Appendix B.

On March 16, 1990, the Court of Appeal, First Appellate District, issued its remittitur certifying that the decision entered on December 15, 1989, had become final.(1)

B. Statement of the Facts

Respondent incorporates by reference the statement of the facts in the appellate opinion appended to the petition for writ of certiorari as Appendix A.

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1. On March 21, 1990, petitioner filed a motion with the Court of Appeal, First Appellate District, to recall the remittitur pending a decision on certiorari. On April 6, 1990, The Court of Appeal denied the petitioner's petition to recall the remittitur. Then, on May 4, 1990, the petitioner filed an application for stay of enforcement of the judgment of the Court of Appeal, First Appellate District. On May 8, 1990, the Honorable Sanda D. O'Connor denied petitioner's application for a stay pending disposition of petition for writ of certiorari. On May 17, 199[illegible] the juvenile court vacated its findings regarding the all[illegible]ations against respondent.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Introduction and Summary

In re Hodari D. 265 Cal.Rptr. 79 (1989) is a case in which (petitioner concedes) there was no reasonable suspicion of criminal conduct, but the police, with the intention of detaining respondent, ran directly at him "in such a fashion as to cut him off and confront him head on." Contemporaneously with the police misconduct, contraband was abandoned.

Hodari D. does not present any novel issues to this Court because the decision of the California Court of Appeal, First Appellate District is in accord with Michigan v. Chesternut 486 U.S. 567 (1988) and with case law precedent throughout the United States.

The opinion in In re Hodari D. 265 Cal.Rptr. 79 (1989) should not be disturbed because it was rendered by an intermediate appellate court. The opinion is one state intermediate appellate court's fact-specific application of the standard set forth in United States v. Mendenhall 446 U.S. 544 (1980). The standard in Mendenhall was explicitly adopted by this Court in Michigan v. Chesternut, supra. Additionally, the opinion is one state intermediate appellate court's fact-specific application of the Fourth Amendment exclusionary rule under Brown v. Illinois 422 U.S. 589 (1975) and its progeny.

Petitioner's writ should also be denied because the Court of Appeal's opinion was "depublished" by the Supreme Court of the State of California under Article VI, section

14 of the California Constitution and California Rules of Court section 976 (see Appendix B attached to petitioner's petition). Therefore, Hodari D. has no precedential value. California Rules of Court section 977 bars its use as precedent.(2)

Hodari D. is simply not a suitable vehicle for deciding the very broad Fourth Amendment issues which the petitioner is attempting to raise.

Respondent's argument that the contraband was properly suppressed is based on a two-step analysis.

Step 1 (presented in Part B, infra) is that an actual physical seizure of a person is not required for a detention.

Step 2 (presented in part C, infra) is that evidence abandoned upon an illegal detention must be suppressed.

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2. California Rules of Court section 977 reads in pertinent part as follows: (a) "An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b)." The exceptions do not apply here.

B. An actual physical seizure is not required for a detention.

The petitioner's brief is contrary to some major precepts of the Fourth Amendment and case law. In search and seizure issues, the Supreme Court, for the most part, has eschewed "bright line" rules in favor of a "reasonableness" approach on a case by case basis. Katz v. United States 389 U.S. 347 (1967).

The petitioner's position is that whenever the police give chase it is always and in all circumstances, and, as a matter of law, a consensual encounter and never a detention. The petitioner wants this Court to re-write Fourth Amendment law with respect to detentions. The petitioner wants this Court to disregard the common sense "reasonable person" test and replace it with the inflexible rule that there must be a physical restraint before there can be a detention. Fourth Amendment precedent in this Court and throughout the United States does not support the petitioner's position.

In United States v. Mendenhall 446 U.S. 544, 554 (1980), Justice Stewart writing for himself and then Justice Rehnquist stated in the opinion, that whether a person is seized with the meaning of the Fourth Amendment, "only if, in view of all the circumstances surrounding the incident, a reasonable person would not have believed that he was not free to leave." Id. at p. 554 (fn. omitted). Justice Stewart provided the following examples of circumstances that might indicate a seizure: "the

threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Id. at p. 554.

In Michigan v. Chesternut 486 U.S. 567 (1988), the full Court explicitly adopted the test set forth in Justice Stewart's opinion in Mendenhall.

In Michigan v. Chesternut, supra, this Court refused to fashion a bright-line rule applicable to all investigatory pursuits. Id. at p. 1979. This Court held that the appropriate test is whether a reasonable man, viewing the particular police conduct as a whole and within the setting of all the surrounding circumstances, would have concluded that the police had in some way restrained his liberty so that he was not free to leave Id. at p. 1979.

In Chesternut, this Court explicitly rejected Michigan's invitation to adopt a rule that "the Fourth Amendment is never implicated until an individual stops in response to the police show of authority." Id. at pp. 1978-1979. Now, just two years later, the petitioner is asking this Court to revisit the issue it decided in Chesternut, i.e., "whether the officers pursuit of respondent constituted a seizure implicating Fourth Amendment protections." Id. at p. 1978. Petitioner's claim that actual physical restraint or termination of movement is a prerequisite to implication of Fourth Amendment protections is the same claim this Court rejected in

Chesternut. This Court did not rule that a chase could not be sufficiently intimidating to constitute a detention. Since Chesternut, the test has not changed, and there is no reason to do away with a standard that has evolved from decisions in Mendenhall, Florida v. Royer 460 U.S. 491 (1983), and culminating in Chesternut.

Contrary to petitioner's complaint, the fact this test turns on specific circumstances does not render it unworkable. This Court in Chesternut stated that there was "no bright line rule" applicable to all investigatory pursuits. This Court also stated that the test "is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." Id. at p. 1979. The strength of the test is that it is an objective test which is broad enough to apply "to the whole range of police conduct in an equally broad range of settings." There is nothing unique or difficult about applying "reasonable person" tests to police conduct. (E.g. Rhode Island v. Innis 446 U.S. 291 (1980); Illinois v. Rodriquez ____U.S.____ 58 U.S.L.W. 4892 (1990).

Under the Mendenhall-Chesternut case-by-case approach, it is to be expected that in some circumstances an aggressive police pursuit, cutting off or blocking a suspect, will constitute sufficient force or show of authority that a reasonable person would not feel free to leave.

The opinion in Hodari D. is simply one intermediate

state appellate court's fact-specific application of the Mendenall-Chesternut test to a set of circumstances considerably more coercive and intimidating than Chesternut itself. The Court of Appeal said, "This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion as to cut him off and confront him head on. Under the rationale of Chesternut, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or 'otherwise control the direction or speed' of one's movement." The Court of Appeal, also noted that the "facts of the instant case illustrate a situation tantamount to a physical seizure. Appellant, who was running down the sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a jacket marked 'police,' who was 11 feet away and running toward him." (See Appendix A, p. 12, n. 4.)

Here, the Court of Appeal applied the correct standard, the Mendenhall-Chesternut standard, to the fact-specific situation presented above, and the result should not be disturbed.

In Minnesota v. Olson ___U.S.___ 110 S.Ct. 1684 (1990), a Fourth Amendment case, this Court found that the Minnesota Supreme Court applied the correct standard in determining whether exigent circumstances existed when a defendant was arrested in his house without a warrant. This Court said, "We are not inclined to disagree with this

fact-specific application of the proper legal standard." Id.at p. 1690.

Here, the proper legal standard is that set forth in United States v. Mendenhall, supra, and followed in Chesternut. The Court of Appeal in Hodari D. applied the proper legal standard as set forth in Mendenhall and Chesternut. Because the Court of Appeal applied the proper standard to a fact-specific situation, this Court should decline to disturb the Court of Appeals application of the reasonable person standard just as it did in Minnesota v. Olson, supra.

Cases decided in the United States after Mendenhall and before Chesternut have never held that a physical restraint is required for a detention.

In Swicegood v. State 448 So.2d 433 (Ala.Cr.App., 1983), People v. Thomas 660 P.2d 1272 (Colo., 1983), and People v. Washington 192 Cal.App.3rd 1120, 238 Cal.Rptr. 840 (1987), abandoned contraband was suppressed in each case because of police chases held to constitute illegal detentions.

And, in Hawkins v. State 758 S.W.2d 255 (Tex.Cr.App. 1988), a post Chesternut case, police officers gave chase after Hawkins who they knew to be a person who sold drugs. During the chase, Hawkins abandoned contraband. The Texas Court of Appeal, aware of the holding in Chesternut, said the facts in Hawkins were distinguishable from those in Chesternut. The Texas Court of Appeal said, "The actions taken by the Ft. Worth police officers were exactly the

type not found in the Chesternut case, e.g., actions designed to control the direction of appellant's movement by 'closing in' on him in order to detain and question him. The instant case represents more than a mere approach by law enforcement officers, identified as such." Thus, the holding in Hawkins is consistent with and grounded on Chesternut.

Despite the lack of precedent, The petitioner cites Brower v. Inyo County __U.S.__, 103 L.Ed.2d 628, 635 (1989) for the proposition that in order for there to be a detention there must be physical restraint. In Brower, a fleeing suspect was killed when his car crashed into a police roadblock. The lower court held that the death was caused by the suspect's voluntary act of failing to stop. Brower also makes reference to Hester v. United States 265 U.S. 57 (1924) to illustrate its holding requiring wilful police misconduct. If Brower is applicable in any aspect to this case, it would be in the definition of a seizure as petitioner pointed out where the Brower court defined a seizure as "a Government termination of freedom of movement through means intentionally applied." Indeed, Brower was a case that involved a physical termination of freedom of movement of the most dramatic kind -- a fatal collision into a police roadblock. In Hodari D., when the officers engaged in an active chase, their intent was to terminate respondent's freedom of movement.

In Chesternut, this Court explicitly declined to adopt the rule that the petitioner is urging now, i.e. an

inflexible rule on what constitutes a detention, that is, a physical restraint rule. Chesternut established a fact oriented test. And, the opinion in Hodari D. is just one state court's application of the "reasonable person" test. Under the ruling in Chesternut, the Court of Appeal's ruling in Hodari D. is the kind of ruling one could expect.

The opinion in Brower gave no indication that this Court was re-writing Fourth Amendment law. This Court has always held there are two kinds of detentions: a physical detention and a show of authority. Hodari D. is a blend of the two - the police officers were attempting to cut respondent off and there was a show of authority.

In Chesternut, this Court had an opportunity to adopt the inflexible requirement of a physical restraint rule that the petitioner puts forth and declined to do so. It is ridiculous for petitioner to suggest that in a case (Brower was a civil rights case) not dealing with the detention issue, this Court meant to re-write Fourth Amendment law with respect to detentions and do away with the reasonable person test set forth in Mendenhall and followed in Chesternut.

In an illuminating post Chesternut-Brower state court decision in State v. Lemmon 568 A.2d 48 (Md. 1990), the Court of Appeals in a fact-specific case similar to Hodari D. followed the reasonable person test set forth in Chesternut. The Court of Appeal declined to accept the petitioner's "notion" that Brower refined Chesternut to hold that no detention occurs until the police officer has

physical control.

In Lemmon, plainclothed officers in an unmarked car acting on a tip observed two black males (one was Lemmon) in the area. Lemmon started to walk away when he saw the officers. One of the officers identified himself and ordered Lemmon to "Come here." In response, Lemmon fled, and the officers gave chase on foot and with a police car. The police car attempted to cut Lemmon off. During the chase, Lemmon abandoned contraband.

The Court of Appeal rejected the petitioner's "notion." The petitioner's "notion" was that Brower refined Chesternut by "flatly holding that no seizure takes place until the restraining effect of a police command actually occurs, i.e., when the person is within the police officer's physical control." Id. at p. 573. The Court of Appeal went on to say, "we believe that Brower is in no way inconsistent with Chesternut and leaves the Chesternut test intact in all material aspects." Id. at p. 574.

Similarly, in State v. Lopez 783 P.2d 479 (N.M.App. 1989), police officers used their van to block defendant's lawfully parked pickup, four police officers approached the pickup, and the officers invoked their authority by displaying their badges. The Court of Appeal stated there was sufficient evidence to support a finding of physical restraint and a show of authority. Id. at p. 482. Lopez read Brower as consistent with the principle that "[b]locking a subject's vehicle is a form of physical restraint." Id. Hodari D. was a case of the police

blocking the respondent's path and approaching him.

The petitioner has not cited any case that has adopted the petitioner's anomalous interpretation of Brower. Thus, the approach taken by the California Court of Appeal in Hodari D. is consistent with the approach taken by courts in other states, i.e., each case is decided on a fact by fact basis.

Succintly put, there is no precedential value in Hodari D., and this fact-specific case does not offer any kind of novel issue which lends itself to a petition for certiorari.

Finally, it would be bad public policy to re-write Fourth Amendment law to require a law enforcement officer to physically restrain a person in order to detain. There is inherent danger to police officers and citizens in requiring a physical restraint in order to detain. Encounters between police officers and the citizenry would be escalated to a deadly level if this Court would require a physical restraint of every defendant. By not recognizing certain police conduct, i.e., chases, as a detention, the petitioner's position would allow just the kind of harassment (without reasonable suspicion) that Terry v. Ohio 392 U.S. 1 (1968) and its progeny intended to prevent.

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C. Whether evidence abandoned upon an illegal detention must be suppressed.

The Fourth Amendment exclusionary rule applies when a person is under illegal detention and he discards contraband as a result of that detention. Hodari D. is a fact-specific application of the exclusionary rule.

There is nothing new in the proposition that once illegal police conduct commences, an act of the defendant which is directly induced by that illegality and which reveals evidence is the fruit of the illegal conduct, even if the defendant's act is "voluntary" in the Fifth Amendment sense. Also, the question of whether the particular act is the fruit of the detention is a fact-specific inquiry.

Brown v. Illinois 422 U.S. 589 (1975), Dunaway v. New York 442 U.S. 189 (1979) and Taylor v. Alabama 457 U.S. 687 (1982) illustrate the preceding point. In Brown, Dunaway and Taylor the defendants were arrested without probable cause and made inculpatory statements while in custody and after being Mirandized. The state courts held that the Miranda warning broke the causal connection between the illegal arrest and the inculpatory statements. This Court held that the Miranda warnings failed to break the causal connection between the illegal arrests and held the statements inadmissible.

Brown v. Illinois, supra, set forth factors to be considered in determining whether evidence is a product of police illegality. The facts are whether the evidence was

obtained as a product of the defendant's free will, the temporal proximity of the illegality to the discovery of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official conduct. Id. at pp. 603-604.

Brown, Dunaway, and Taylor stand for the proposition that the indirect fruits of an illegal search or arrest should be suppressed when there is a causal connection to the underlying illegality.(3)

Similarly, in Lanier v. South Carolina 474 U.S. 25 (1985) this Court held that "the fact that [a] confession may be 'voluntary' for purposes of the Fifth Amendment, in the sense that Miranda warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest. In this situation, a finding of 'voluntariness' for purposes of the Fifth Amendment is

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3. In Harris v. New York ___U.S.___ 110 S.Ct. 1640 (1990), a defendant was arrested in his home without a warrant but with probable cause, in violation of the Fourth Amendment under Payton v. New York 445 U.S. 573 (1980). At the police station, the defendant made a confession. The Court, distinguishing Brown v. Illinois, supra, held that the confession was not a fruit of the illegality entry into the defendant's home. The statement was not linked with the illegality, i.e., the arrest within the home. The Court was adhering to the rule that where the custody was illegal, any fruits thereof, unless sufficiently attenuated, is the fruit of that illegality. In Hodari D., the detention itself -- the custody -- was illegal. None of the officers had a reasonable suspicion that illegal activity was taking place. The trial court concluded that police had no reasonable cause to detain respondent. And, the petitioner does not dispute the trial court's finding that the police had no reasonable cause to chase or detain respondent.

merely a threshold requirement for Fourth Amendment Analysis." [Citations.] Id. at p. 26.

The exclusionary rule comes into play if and only if the police conduct is so restraining that a reasonable person would not feel free to leave. Hence, just as in Chesternut, the usual police approach of a citizen will have no such effect, so there is no danger that abandoned property will be suppressed where the police have done nothing illegal. Conversely, however, where the police have illegally detained someone, the fruits of that detention must be determined under the test of Brown, Dunaway, and their progeny.

In Hodari D., the illegal police conduct involved a police officer running head on at respondent in an effort to stop him. The officer's purpose was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's actions were unfounded because he saw nothing other than four Black youths standing around a car. The immediate discard of contraband was directly caused by the police misconduct. There were no intervening circumstances.

In Hodari D., the abandonment of contraband was contemporaneous with the illegal police conduct of seizing the respondent. In fact, the petitioner concedes "the taking was he result of governmental action, for respondent indisputably abandoned the rock in reaction to the approaching officer." The petitioner's own formulation of the causality here brings Hodari D. within Brown and its progeny. The only real difference between this case and

the Brown line of cases is that the latter involved what suspects verbally divulged at the very moment of the seizure. Thus, here the case for suppression is even stronger than in cases like Brown because the line between the illegality and the evidence is still tighter.

Chesternut indictates that the exclusionary rule will have no application where an officer merely approaches a defendant or engages in a conversation or otherwise initiates a consensual encounter. In other words, it has no application where the officer does not detain the suspect. Only when a police officer illegally restrains a defendant under the Mendenhall-Chesternut test does the exclusionary rule come into play at all. The situation in which a police officer either by force or a show of authority communicates to a person that he is not free to leave despite the lack of a reasonable suspicion is precisely the kind of situation that should be covered by the exclusionary rule. The petitioner's position would undermine the deterrent effect of the exclusionary rule. Cases throughout the United States reflect that it is not uncommon for a defendant confronted with this show of authority to throw down contraband that he happens to have. This kind of scenario must be policed by the Fourth Amendment. It is quite predictable that someone illegally detained by the police will try to dispose of an incriminating item. The link between these two events, i.e., the illegal detention and the abandonment, is so close and recurring one and that is why a common sense

approach must be taken and say that the abandonment is the fruit of the illegal act.

The petitioner does not and cannot claim that the cases throughout the country are in a state of disarray on this point. On the contrary, both federal and state decisions consistently recognize that evidence thrown down or discarded upon an illegal detention is not a voluntary abandonment and must be suppressed.

In United States v. Beck 602 F.2d 726, (5th Cir., 1979), police officers unlawfully ordered a car to stop. The occupants tossed illegal drugs out the car window. The Court ordered the contraband suppressed as a result of the police activity. Beck also held that "An abandonment that is the product of police misconduct is not voluntary and cannot, therefore, vitiate the taint of an illegal detention." Id. at p. 729-730.

United States v. Pirolli 673 F.2d 1200, 1204 (11th Cir. 1982) also held that an abandonment that was the product of police misconduct was not voluntary.

In Hawkins v. State, supra, Moss v. Com. 373 S.E.2d 170 (Va.App. 1983), People v. McFadden 524 N.Y.S.2d 902 (A.D. 1988), People v. Menifee 100 Cal.App.3d 235, 160 Cal.Rptr. 682 (1979) and People v. Washington, supra, each court found an involuntary abandonment of contraband as a result of police misconduct.

The purpose of the exclusionary rule is to deter the kind of police misconduct that is illustrated by the cases. The exclusionary rule would be meaningless if it allowed

police officers to harass people without reasonable suspicion and any contraband that turned up in an illegal encounter could then come in on the theory that the act that revealed it was voluntary even if the detention was not. This does not mean that a defendant can "immunize" himself everytime he sees a police officer approaching as petitioner would have this court believe. Petitioner claims that the unpublished opinion in Hodari D. gives a suspect a right to "immunize" himself by "preemptively" discarding contraband if the police approach. Petitioner relies upon Brower. However, the facts in Brower did not even remotely involve any abandonment questions. The Court's passing citation of Hester only illustrated its holding requiring wilful police conduct. In addition, the Court no more intended to use a civil rights/wrongful death suit to overrule Brown and other fruits cases, that it did to overrule Chesternut with it.

In Smith v. Ohio, ___U.S.___ 110 S.Ct. 1288 (1990), a defendant threw a paper bag on the hood of his car after the police ordered him to stop. The state claimed that throwing the paper bag on the car was an abandonment. This Court said it was not an abandonment because the defendant was trying to protect his privacy interest in it. Smith rebuts the petitioner's claim that the discarding of incriminating evidence in the face of police conduct is necessarily a voluntary act which takes the evidence out of the Fourth Amendment.

Since the evidence in Hodari D. was abandoned

contemporaneously with an illegal detention, the Fourth Amendment exclusionary rule came into play. The California Court of Appeal followed Brown and its progeny and took a common sense approach and applied the Mendenhall-Chesternut test to a fact-specific situation. The Court of Appeal correctly held that the contraband must be suppressed, and its decision should not be disturbed.

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CONCLUSION

Hodari D. does not present any novel issues to this Court. There is nothing special about this case as to both the detention and abandonment issues. Hodari D. is consistent with many cases through the country, including many cases that post-date Chesternut and Brower. The result here turned on the facts, just as this Court in Chesternut contemplated detention cases would. As in Minnesota v. Olson, supra, there is no reason at all for this Court to disturb one state court's very fact-specific application of the broad governing standards. In other words, there is simply nothing in this unpublished case meriting the Court's attention.

For these reasons, the petition for a writ of certiorari should be denied.

Dated: July 29, 1990

Respectfully submitted,

James L. Lozenski

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No. 89-1632

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.,

Respondent.

OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

CERTIFICATE OF SERVICE

I, **JAMES L. LOZENSKI**, a member of the Bar of this Court, hereby certify that on July 30, 1990, a copy of the respondent's brief in opposition was mailed, first-class postage prepaid, to: Ronald E. Niver, Supervising Deputy Attorney General, State of California, 350 McAllister Street, San Francisco, CA 94102, counsel for petitioner herein. I further certify that all parties required to be served have been served.

James L. Lozenski

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Counsel for Respondent

No. 89-1632

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

JOINT APPENDIX

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Petition for Certiorari Filed April 18, 1990
Certiorari Granted October 1, 1990

JOINT APPENDICES

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RELEVANT DOCKET ENTRIES

Date	Docket Entries
April 20, 1988	Petition for Wardship Under California Welfare and Institutions Code section 602 filed in Alameda County Superior (Juvenile) Court, alleging that respondent HODARI, D. possessed cocaine, in violation of California Health and Safety Code section 11350.
May, 2, 1988	RESPONDENT Moves to Suppress Evidence Under California Welfare and Institutions Code section 700.1
May 19, 1988	The Juvenile Court Hears And Denies The Motion to Suppress
May 20, 1988	The Juvenile Court Finds The Allegations in the Wardship Petition to be True
June 6, 1988	The Juvenile Court Continues a Previous Wardship and Orders That Respondent be Placed in a County Facility for a Maximum Period of Five Years and Eight Months.
December 15, 1989	The California Court of Appeal for the First Appellate District Reverses the Judgment of Wardship
March 15, 1990	The California Supreme Court Denies Petitioner's Application for Review

FILED ALAMEDA COUNTY, APRIL 20, 1988
RENE C. DAVIDSON, COUNTY CLERK

OPD #88-44699

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA
IN SESSION AS A JUVENILE COURT

In the Matter of
HODARI DULAN, a minor
Age 16 Birthdate 6-5-71, CA
Address 2627 65th Ave., Oakland, CA
#632-2579

SUBSEQUENT PETITION Case No. 141401

I, the undersigned petitioner, say on information and belief:

That he is a person described by Section 602 of the Welfare and Institutions Code, in that on or about April 18, 1988, in the County of Alameda, State of California, he did then and there commit a FELONY, to wit: possession narcotics, a violation of Section 11350 of the Health and Safety Code of California, in that said minor did then and there possess a controlled substance, to wit: cocaine;

The names and residence addresses of parents and guardians of said person are:
Father: Albert Dulan, 5797 Foothill Boulevard, Oakland, CA # 569-7345
Mother: Paulette Robinson, 2627 65th Avenue, Oakland, CA # 632-2579

The above named minor is detained in custody. Said minor was taken into custody April 18, 1988 at 10:00 p.m. Hearing as to further detention is set for 1:15 p.m. on April 21, 1988 at 400 Broadway, Oakland, California.

THEREFORE, I request that this minor be adjudged and declared a ward of the court.

JOHN J. MEEHAN, DISTRICT ATTORNEY,
Petitioner

On information and belief, I declare under penalty of perjury that the foregoing is true and correct.
Executed at Oakland, California, on April 20, 1988

/S/
Deputy District Attorney
for Ann Kenfield

The above petitioner is hereby set for pre-trial hearing April 29, 1988, 10:00 a.m., Dept. 25a

SIMMS:skr

SUBSEQUENT PETITION

FILED ALAMEDA COUNTY, MAY 2, 1988
RENE C. DAVIDSON, COUNTY CLERK

JAMES R. JENNER
PUBLIC DEFENDER
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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA
IN SESSION AS A JUVENILE COURT

In the Matter of,

HODARI DULAN,

A Minor.

Dept. No.: 25

No.: 141401
MOTION AND NOTICE OF MOTION PER §700.1 W&I

TO: THE DISTRICT ATTORNEY OF THE COUNTY OF ALAMEDA AND THIS COURT:

PLEASE TAKE NOTICE that on May 12, 1988, at 8:45 am in Department No. 25 of the above-entitled court, the above-named minor will, and hereby does, move to suppress evidence per §700.1 of the Welfare and Institutions Code. This evidence includes but is not limited to the following indicated items:

All physical (and intangible) evidence seized or obtained as a result of the following deprivations of the minor's liberty and right to privacy, including that resulting from:
__X__ the minor's detention;
____ the search of pat-down or frisk of the minor's person;
____ the minor's arrest;

All physical (and intangible) evidence seized or obtained from a search, entry, and/or opening of the following place(s), including:
____ the residence, building, or structure, entered or invaded by the police in this cause;
____ the box(es), package(s), or other enclosures opened or invaded by the police in this cause;

___ the vehicle(s) entered or invaded by the police in this cause;

This motion is based on violation of the minor's right as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 10, and 13 of the California Constitution. It is based in part on the following particular grounds:

__X__ the police action was without a warrant, and lacked sufficient cause to justify the invasion of liberty complained of;

___ the arrest was in the minor's place of residence without a warrant;

___ the police action violated some or all of the following Penal Code sections: 840, 841, 842, and 1531;

___ the warrant in this cause was insufficient on its face;

___ the affidavit supporting the warrant in this cause was made defective by the omission of material facts or the inclusion of erroneous information;

___ the items seized were outside the scope of the warrant, or the warrant was impermissibly broad;

___ the search was unreasonable or excessive in its scope;

___ the police action was without warrant and relied upon hearsay information from other police sources; the defense therefore requests that said resources be produced in court. People v. Harvey, 156 Cal.App.2d 516. People v. Madden, 2 Cal.3d 1017.

This statement of grounds and evidence is not intended to be exclusive and is based upon such discovery as was available on this date.

DATED: April 29, 1988

Respectfully submitted,
JAMES R. JENNER
PUBLIC DEFENDER

SIGNED BY:
JANICE M. BRICKLEY,
ASSISTANT PUBLIC DEFENDER

FILED ALAMEDA COUNTY, MAY 18, 1988
RENE C. DAVIDSON, COUNTY CLERK

JAMES R. JENNER
PUBLIC DEFENDER
400 PROADWAY, 1ST FLOOR ANNEX
OAKLAND, CA 94607
(415) 268-7474

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
IN SESSION AS A JUVENILE COURT

In the Matter of,

HODARI DULAN,

A Minor.

Dept. No.: 25

No.: 141401

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SUPPRESS PURSUANT TO WELFARE AND INSTITUTIONS CODE SECTION 700.1

AN OBJECT DISCARDED UPON AN ILLEGAL DETENTION OR THREAT OF ILLEGAL DETENTION MUST BE SUPPRESSED.

It is well-established in both federal and state law that evidence thrown down or discarded upon an illegal detention or threat of illegal detention must be suppressed. In Reid v. Georgia (1980) 448 U.S. 438, narcotics agents saw Reid at an airport. They approached him and said, "Come with us." He ran, throwing down a bag containing cocaine. The United States Supreme Court ordered it suppressed, eight to one, because the agents did not have enough

information to justify detaining Reid.

In Badillo v. Superior Court (1956) 46 Cal.2d 269, narcotics officers unlawfully entered Badillo's house. Badillo ran out and threw down some heroin. There was no threat to search Badillo's person. However, Justice Traynor in ordering suppression, under the Fourth Amendment, addressed the issue of whether "abandoned" contraband must be suppressed:

> The Attorney General contends that defendant abandoned the evidence when he threw it toward Agent Hipkins and that therefore he may not object to its use against him. It clearly appears, however, that defendant's flight out the front door and attempted disposal of the evidence was the direct result of Officer Getchell's illegal entry, and accordingly, the evidence was obtained in violation of the constitutional guarantees. Silverthorne Lbr. v. United States 251 U.S. 385, 392, et al.

Id. at p. 273.

In Gascon v. Superior Court (1959) 169 Cal.App.2d 356, the officers unlawfully detained and questioned the defendant who was walking out of a liquor store. After questioning him, the officers told the defendant they were going to search him. Rather than allowing himself to be searched and later objecting in court, the defendant ran and threw contraband to the ground. The court suppressed the evidence as the product of an unlawful detention.

In People v. Menifee (1979) 100 Cal.App.3d 235, two San Francisco narcotics officers, walking in a known narcotics area, saw two men walk around a corner. The two men recognized one of the narcotics officers, turned about and walked rapidly away. One of the narcotics officers pursued them, closing the distance from twenty to thirty feet away to one foot behind the two men. At this, one of the two men, Menifee, tossed a pouch of heroin in a trash can.

Justice Racanelli, joined by his colleagues, ruled that the heroin was obtained as the product of a threatened illegal detention and affirmed the trial court in ordering suppression. Although there was no threat that Menifee would be searched, suppression was mandated by Badillo v. Superior Court, supra. (As noted above, there was no threat to search Badillo, either, where Justice Traynor for the Court ordered suppression.) The threatened detention in Menifee was illegal: "Neither presence in an area of high narcotics use nor the deliberate avoidance of police contact--without more --constitute sufficient grounds for a lawful detention." Menifee, 230 (citation omitted).

The most recent California case on this issue is People v. Washington (1987) 192 Cal.App.3d 1120. In

that case the court held that "giving chase after an individual in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention." Id. at 1126 (emphasis added), thus no longer referring to a "threatened detention." The court addresses the question of whether discarding contraband in response to an illegal detention is the "fruit of the poisonous tree."

> In analyzing whether the abandonment breaks the casual connection between the detention and the act of abandonment, courts have examined the facts to determine whether the action was . . . "sufficiently an act of free will." (Taylor v. Alabama (1982) 457 U.S. 687, 690 [73 L.Ed.2d 314, 319, 102 S.Ct. 2664]). . . . Applying these factors to the facts before us, we cannot say the abandonment of contraband by defendant was free of the taint of the illegal detention.
> Two minutes elapsed between the seizure and the abandonment; there were no intervening circumstances. Instead, because defendant discarded the bindles during the chase, the abandonment occurred while he was illegally seized and there could be no intervening circumstances.

Id. at 1126-27. The facts of the present case are identical, except that only one minute elapsed between the unlawful seizure and the abandonment.

Washington and Menifee are in accord with all other states and federal law, where it is "uniformly held" (Fletcher v. Wainwright (5th Cir. 1968) 399 F.2d 62, 64) that tossing evidence down when illegally detained

requires suppression of the evidence.

In United States v. Beck (5th Cir. 1979) 602 F.2d 726, police officers unlawfully ordered a car to stop. The occupants thereupon tossed illegal drugs out the car's window. The Court ordered them suppressed as the result of illegal police activity, relying upon Wong Sun v. United States (1963) 371 U.S. 471.

In United States v. Newman (10th Cir. 1974) 490 F.2d 993, a federal agent stopped a pickup and told the occupants he wanted to look in the back. The pickup drove away and was found abandoned down the road, where it was searched and contraband found. The Court ordered suppression: "Everything was triggered by the original illegal intrusion and the contraband evidence was thus inadmissible as the 'fruit of the poisoned tree.'" Ibid., 995 (Citing Wong Sun v. United States, supra.)

In People v. Shabaz (Mich. 1985) 378 N.W.2d 451, cert. dism. (1986) 106 S.Ct. 3326, officers illegally chased the defendant, whereupon he threw down a paper bag containing a revolver. It was ordered suppressed, relying upon Florida v. Royer (1983) 460 U.S. 491, and Wong Sun v. United States, supra.

> Regardless of whether abandonment was intended, defendant's actions cannot be used to

> dissipate the taint flowing from the unreasonable police conduct. Where, as here, the police activity is coercive in nature, we find that it serves to nullify any abandonment. Shabaz at 462.

In State v. Bennett (R.I., 1981) 430 A.2d 424, detectives investigating a report of narcotics activity at a motel room saw a man, unknown to them, walking through the parking lot. They shouted, "Police, hold it. We want to talk to you." The man tossed down a bag, and it split open, revealing illegal drugs.

It was ordered suppressed as the product of an illegal detention. The Rhode Island Supreme Court noted that in similar situations courts "have uniformly held that the initial illegality tainted the seizure of the evidence," quoting Fletcher v. Wainwright (5th Cir. 1968) 399 F.2d 62;, 64. Bennett, 428.

In People v. Cantor (N.Y. 1975) 324 N.E.2d 872, police illegally detained Cantor, whereupon Cantor displayed a handgun. New York's highest court unanimously ordered it suppressed, reversing the weapon conviction, as the weapon was the fruit of the unlawful seizure of Cantor.

In Commonwealth v. Harris (Pa., 1980) 421 A.2d 199, police unlawfully took a Mr. Foster and others to the police station for a vehicle check. Foster was

allowed to use the bathroom and jettisoned some stolen property in a toilet tank. It was ordered suppressed, as the product of illegal police conduct.

In State v. Dineen (Minn., 1980) 296 N.W.2d 421, an officer was warning Dineen that he was illegally double-parked. The officer saw a coat on the back seat of Dineen's car and told Dineen to move it. Dineen instead jumped out and ran away. The officer picked up the coat, found under it a grocery bag--and in the grocery bag found plastic bags containing illegal drugs. The prosecution argued abandonment. The Minnesota Supreme Court ruled that the abandonment was the product of illegal police activity and affirmed the trial court in suppressing the drugs.

In Commonwealth v. Barnett (Pa., 1979) 398 So.2d 1019, Philadelphia officers were driving along and saw Barnett. He looked at them several times, so they stopped the police car and got out. Barnett ran. The officers ran after him, shouting "Stop." Barnett threw down a pistol and a box of bullets.

The Pennsylvania Supreme Court ruled that the pistol and bullets were obtained at the fruit of illegal police conduct and affirmed the trial court's order of suppression.

In Commonwealth v. Jeffries (Pa., 1973) 311 A.2d 914, Pittsburgh officers saw Jeffries walking. When Jeffries saw the police, he quickened his pace. The police stopped their car and got out and went after Jeffries. He ran. While giving chase, the police saw Jeffries throw down a cigarette package containing heroin.

It was ordered suppressed, as the fruit of illegal police conduct. The Pennsylvania Supreme Court noted that "courts have considered this situation and have uniformly held that the initial illegality tainted the seizure of the evidence," quoting Fletcher v. Wainwright, supra. Jeffries, 918.

In United States v. Foster (D.C., 1983) 566 F.Supp. 1403, a Washington, D.C. officer unlawfully detained a car and its occupants, whereupon one of the occupants, Foster, discarded a sawed-off shotgun at the side of the road. The court ordered suppression.

> An abandonment that is the product of police misconduct is not voluntary and cannot, therefore, vitiate the taint of an illegal detention. Beck, 602 F.2d at 729-30; United States v. Morin, 665 F.2d at 765-770 (5th Cir. 1982); United States v. Gilman, 684 F.2d 616, 620 (9th Cir. 1982). Foster, 1412.

In Commonwealth v. Borges (Mass., 1985) 482

N.E.2d 314, New Bedford officers detained Borges and asked him what was in his pocket. He tried to flee, was grabbed and struggled. During the struggle Borges pulled bags of heroin from his pocket and tried to swallow them. Held: since Borges was illegally seized at the outset, the heroin must be suppressed.

In Settle v. State (Mo.App., 1984) 679 S.W.2d 310, a Kansas City officer unlawfully ordered a car to stop. The driver, Settle, got out and tossed some illegal drugs to the side of the road. Held: the drugs must be suppressed as product of illegal detention. The Missouri Court of Appeals relied upon Wong Sun v. United States (1963) 371 U.S. 471.

In Swicegood v. State (Ala.Cr.App., 1983) 448 So.2d 433, cert. denied by Alabama Supreme Court No. 83-516, a Birmingham officer saw two men near a motel from where a criminal had been arrested some hours earlier. He shouted "Freeze." The two men ran. One of them, Swicegood, tossed a bag in a garbage can. It contained illegal drugs.

Held: the bag of drugs must be suppressed as the product of a threatened illegal detention. The Alabama court relied on Brown v. Texas (1979) 443 U.S. 47, stating it had "no choice but to use the standard

mandated by the United States Supreme Court." Ibid., 435.

In People v. Thomas (Colo., 1983) 660 P.2d 1272, some Denver narcotics officers were driving along in the "Five Points" area of Denver. One of the officers saw and recognized, across the street, in a Church's Fried Chicken parking lot, Joseph "Cherokee" Thomas. The officer said to the other officers, "There's Cherokee." Cherokee Thomas apparently saw the officers and started running toward a building known as the "shack," occasionally used for gambling. The officers piled out and chased him, and as they followed him inside the shack they saw him toss down six balloons of cocaine. Held: the threat of illegal detention required suppression of the six balloons of cocaine.

In State v. Chopin (La., 1979) 372 So.2d 1222, the police saw the defendant walking along the side of the road carrying a paper bag. The police turned on their patrol car lights and blocked his path. He ran, throwing down the bag, which contained illegal drugs. Held: suppression ordered, as evidence was product of illegal detention:

> Where officers do not have the right to make the investigatory stop, property abandoned or otherwise disposed of as a result thereof cannot be legally seized by the police officer. Ibid., 1224.

In the following cases, defendants threw down illegal drugs upon the threat of illegal detention. Held in all: suppression is ordered. People v. McFadden (1988) 524 N.Y.S.2d 902; People v. Santiago (1988) 524 N.Y.S.2d 893. Harrell v. State (Ala.Cr.App. 1985) 475 So.2d 650; Martinez v. State (Fla.App. 1982) 414 So.2d 301; Monahan v. State, (Fla.App. 1980) 390 So.2d 756.

People v. Patrick (1982) 135 Cal.App.3d 290 and dictum in People v. Holloway (1985) 176 Cal.App.3d 150; (where the court found the detention to be lawful making any further discussion of abandonment dictum), both Second District decisions, criticizes the First District's opinion in Menifee. As we have seen, the Menifee opinion is in conformance with the holdings of the United States Supreme Court and with what is "uniformly held" throughout the United States, in both federal and state courts. The Patrick decision criticizing Menifee is an aberrant anomaly. The weight of authority is overwhelmingly against the Patrick decision. See, recently, People v. Lee (1986) 186 Cal.App.3d 743, 751. And, most recently, Justice Low's opinion in

People v. Washington, supra.

In addition, the reasoning of the Patrick case was disapproved long ago in People v. Haven (1963) 59 Cal.2d 713. Earlier, it had been held that consent to search following an illegal detention or entry was not tainted by the preceding illegal police action. All such rulings were disapproved in Haven, and it is now well settled that consent following an illegal detention is per se invalid. People v. Alderson (1978) 86 Cal.App.3d 274; see also Florida v. Royer (1983) 460 U.S. 491 (consent after illegal detention is tainted).

Consent and abandonment are closely related: both are relinquishments of privacy. "Abandonment, like consent, must be freely given in order to be effective." United States v. Morin (5th Cir. 1982) 665 F.2d 765, 770 (abandonment of luggage by disclaimer was product of illegal detention, thus evidence in luggage suppressed). "[A]n unconstitutional seizure or arrest which prompts a disclaimer of property vitiates that act." United States v. Tolbert (6th Cir. 1982) 692 F.2d 1041, 1045.

Indeed, the Patrick rationale might just as easily apply in Florida v. Royer (1983) 460 U.S. 491. There was no threat to search Royer's luggage. All the same,

the Court held the luggage search tainted:

> Because we affirm the Florida District Court of Appeal's conclusion that Royer was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search. Florida v. Royer, 460 U.S. at 507-508.

Of course, the Patrick rationale is really a criticism of the decision in Reid v. Georgia (1980) 448 U.S. 438. The United States Supreme Court must be followed, though. And so must the rulings of the First District Court of Appeal in People v. Washington, supra, and People v. Menifee, supra. It's called stare decisis.

The purpose of the exclusionary rule is police deterence. If the Patrick rationale is followed, what is to stop an officer from unlawfully detaining individuals in the hope that they will discard contraband, knowing it can then be admitted into evidence?

CONCLUSION:

For the reasons stated above, the motion must be granted.

DATED: May 18, 1988

Respectfully submitted,

JAMES R. JENNER
PUBLIC DEFENDER

SIGNED BY JANICE M. BRICKLEY
ASSISTANT PUBLIC DEFENDER

FILED ALAMEDA COUNTY, MAY 19, 1988
RENE C. DAVIDSON, COUNTY CLERK

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
IN SESSION AS A JUVENILE COURT

In the Matter of,

HODARI DULAN,

A Minor.

No. 141402

Department No. 25

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO SUPPRESS EVIDENCE

STATEMENT OF FACTS:

On April 18, 1988 at 2200 hours, Officers Pertoso and McColgin were on patrol as members of Special Duty Unit II. Officer McColgin was driving an unmarked car. As the officers turned onto 63rd Avenue, they saw the minor and three other male blacks clustered about the passenger side of a red car. The male blacks looked up and immediately all the individuals ran in different directions. The red car left the area at a high rate of speed. Officer McColgin pulled to the curb and Officer Pertoso got out of his car. At that time he was unable to see the minor or

any of the other male blacks. Officer Pertoso ran to an area he believed the individuals he had seen would run to. Officer McColgin drove around the block. Officer Pertoso ran down 63rd to Foothill and along Foothill. He ran to 6225 Foothill and ran east along the building. As he ran, he saw the minor running toward him looking over his shoulder. The minor then looked toward Officer Pertoso and discarded a loose rock of cocaine. At that time Officer Pertoso had said nothing to the minor. After he saw the minor drop the suspected cocaine, the officer placed the minor under arrest for possession of cocaine.

On May 12, 1988 the Honorable Wilmont Sweeney ruled that no probable cause existed to justify chasing the minor or to detain the minor prior to the minor dropping the cocaine.

THE THREAT OF AN ILLEGAL DETENTION DOES NOT REQUIRE THE COURT TO SUPPRESS EVIDENCE DISCARDED BY THE MINOR.

The minor contends that the evidence should be suppressed as a fruit of the poisonous tree of a threatened illegal detention. It is established as a sound premise that evidence which is the direct product of the exploitation of an illegal investigative stop must be suppressed. Courts have rejected in large measure the

corollary that evidence obtained as a result of a threat of illegal police detention should also be suppressed. (See People v. Patrick, 135 Cal.App.3d 290; In re Robert D., 95 Cal.App.3d 767; People v. Holloway, 176 Cal.App.3d 150).

In In re Robert D., a police officer attempted to stop the minor. The court specifically found that the officer had no right to stop or detain Robert. Robert, rather than stopping, sped off failing to yield, speeding and engaging in a hit and run accident. The court in that case said that "Robert had no right to commit numerous additional unlawful acts in order to avoid that which may concededly in the first instance have been an unjustified attempt at detention." (95 Cal.App.3d 767 at p. 772). The court said that one impropriety by the police does not give an individual carte blanche to break the law. (95 Cal.App.3d 767 at 772).

California courts have also distinguished between a threatened illegal detention and a threatened illegal search. While evidence discarded as a result of a threatened illegal search will be excluded, courts have distinguished situations where the detention is illegal but there is no threatened search. In both Restani v. Superior Court, 13 Cal.App.3d 189 and People v.

Robinson, 58 Cal.App.3d 363, the court distinguished between an illegal detention and a threatened illegal search. The court in Restani said that "the appropriate test is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'" (citations omitted) (Restani, 13 Cal.App.3d 189 at 197). The court in Restani noted that at no time did the officer indicate anything other than intent to identify the individual and held that Restani's actions were the product of his own decision rather than a threat of illegal search (see also People v. Siegenthaler, 7 Cal.3d 465).

Seemingly contra to this line of cases is People v. Menifee, 100 Cal.App.3d 235, which upheld a trial court's rulings suppressing evidence. Menifee involved a situation where an undercover officer approached Menifee, who he knew and who knew them. As Menifee and his companion turned and walked away, the officer briskly followed them and as he approached, first Menifee then his companion discarded narcotics. Based on the testimony, the court made factual findings that the narcotics were discarded as a result of a

threatened illegal detention. As noted in People v. Patrick, 135 Cal.App.3d 290, and People v. Holloway, 176 Cal.App.3d 150, the entire record upon which the trial court made its determination is not quoted in the opinion. In light of In re Robert D. and Restani v. Superior Court, it seems logical to infer that evidence was afforded the trial court that led the trial court to infer that an illegal search would necessarily and inevitably followed the detention.

Since Menifee, the Courts of Appeal have decided People v. Patrick 135 Cal.App.3d 290 and People v. Holloway, 176 Cal.App.3d 150. The court in Patrick confronted the opposing authorities of Menifee and Robinson and Restani. The court in Patrick held that "A defendant cannot immunize himself from damning evidence by discarding that evidence on his subjective assumption that an illegal search would follow his detention" (135 Cal.App.3d 290 at 294). In discussing whether abandonment of property would be fruit of illegal improper police practices, the court in Holloway said that "[I]t is only when a person has reasonable cause to believe his private possessions will inevitably be exposed to view by improper police practices that their attempted abandonment will be deemed the fruit of that

conduct." (176 Cal.App.3d 150) (emphasis added).

In People v. Washington, 192 Cal.App.3d 1120 the court again focused on whether the abandonment was sufficiently an act of free will and utilized the test set forth above citing Restani. (192 Cal.App.3d 1120 at 1126). The court cited several factors including the temporal proximity, the presence of intervening circumstances and the purpose of flagrancy of the official misconduct that courts should look to in determining whether the evidence should be suppressed. The court in Washington paid particular attention to the fact that the officers' testimony indicated a subjective belief that black males run from police when they have something to hide. The court stated that the single factor of race triggered the detention and triggered the type of police misconduct which offends our sense of justice (192 Cal.App.3d 1120 at 1128). Detentions which are based on the single factor such as race or religion or sex are totally without justification and courts have virtually without exception have excluded evidence obtained.

Applying the law stated above to the facts of this case, the evidence discarded by the minor should not be suppressed. The minor and three others fled upon

seeing the officers' car and by the time Officer Pertoso got out of the car, he had vanished from sight. No evidence has been presented to suggest that the minor saw the officer get out of the car and form the reasonable inferences drawn from the testimony of the officers, he did not see them. The officer did not directly chase the minor but ran to a place he believed was an "escape route" for the minors. Officer Pertoso did not say or do anything to the minor before the minor dropped the cocaine. Instead, the evidence shows that the minor's flight and discarding of the cocaine was prompted by the minor's "own awareness of the illicit nature of his activities that precipitated his effort" to get rid of the cocaine (176 Cal.App.3d 150), rather than getting rid of the cocaine as a result of a threatened illegal search.

Accordingly, petitioner requests that the minor's motion to suppress evidence pursuant to Welfare and Institutions Code section 700.1 be denied.

DATED: May 19, 1988.

Respectfully submitted,

JOHN J. MEEHAN
District Attorney

SIGNED by ANN KENFIELD
DEPUTY DISTRICT ATTORNEY

PROCEEDING

MR. WILLIAMS: THIS IS THE MATTER OF HODARI DULAN. YOU ARE HODARI DULAN?

THE DEFENDANT: YES.

MR. WILLIAMS: AND, YOU'RE HIS MOTHER, MA'AM?

MS. DULAN: YES.

MR. WILLIAMS: IT'S ON CALENDAR TODAY FOR A HEARING. THIS IS A 700.1 MOTION ALSO. HE IS REPRESENTED BY MS. BRICKLEY. PETITIONER IS MS. KENFIELD.

THE COURT: ALL RIGHT. DOES THE MINOR WAIVE FORMAL READING OF THE SUBSEQUENT PETITION AND THE SUPPLEMENTAL PETITION?

MS. BRICKLEY: YES, HE DOES.

THE COURT: DOES EITHER PARTY WISH TO PROCEED SOLELY ON THE SUPPRESSION MOTION FIRST?

MS. KENFIELD: YES.

THE COURT: ALL RIGHT. WE'LL PROCEED ONLY ON THE SUPPRESSION MOTION. YOU MAY PROCEED, MS. KENFIELD.

MS. KENFIELD: THANK YOU, YOUR HONOR. PETITIONER CALL OFFICER MCCOLGIN.

OFFICER BRIAN MCCOLGIN

(Having been duly sworn, was called on behalf of the Petitioner.)

THE CLERK: PLEASE STATE YOUR NAME.

THE WITNESS: MY NAME IS BRIAN MCCOLGIN.

THE CLERK: SPELL YOUR FIRST AND LAST NAME.

THE WITNESS: B-R-I-A-N M-C-C-O-L-G-I-N

DIRECT EXAMINATION

BY MS. KENFIELD: Q. OFFICER MCCOLGIN, YOU'RE EMPLOYED BY THE OAKLAND POLICE DEPARTMENT AS A POLICE OFFICER, IS THAT CORRECT?

A. YES.

Q. ON APRIL 18, 1988, AT 22:00 HOURS WERE YOU ON DUTY?

A. YES.

Q. WHAT WAS YOUR ASSIGNMENT?

A. WE WERE – IT WAS SPECIAL DUTY UNIT 2 DRUG TASK FORCE ON MURDER PATROL.

Q. AND, WERE YOU ALONE OR WITH A PARTNER?

A. WITH A PARTNER.

Q. WHO WAS YOUR PARTNER?

A. OFFICER JERRY PERTOSO, P-E-R-T-O-S-O.

Q. AND YOU AND OFFICER PERTOSO WERE BOTH DRESSED IN STANDARD TASK FORCE UNIFORM, THAT IS, A BLUE JACKET WITH THE WORD POLICE WRITTEN ON THE FRONT AND BACK, BLUE JEANS, GUN BELT AND TENNIS SHOES?

A. YES.

Q. WERE YOU IN A TYPE OF CAR?

A. YES.

Q. WHAT TYPE OF CAR WERE YOU IN?

A. BROWN DODGE.

Q. APPROXIMATELY TEN O'CLOCK IN THE EVENING, WHERE WERE YOU.

A. IN THE AREA OF 2663 63RD AVENUE.

Q. AND, WHO WAS DRIVING?

A. I WAS.

Q. AND, WHICH WAY WERE YOU PROCEEDING ON 63RD AVENUE?

A. SOUTHBOUND FROM FOOTHILL BOULEVARD.

Q. WHICH WAY WERE YOU GOING ON FOOTHILL?

A. WESTBOUND.

Q. DID YOU NOTICE ANYTHING AS YOU TURNED FROM WESTBOUND FOOTHILL TO SOUTHBOUND 64TH AVENUE?

A. YES.

Q. WHAT DID YOU SEE?

A. WE SAW APPROXIMATELY FOUR TO FIVE MALE BLACKS. THEY WERE STANDING AROUND A RED COMPACT CAR WHICH WAS PARKED IN A SOUTHBOUND DIRECTION ALONG THE WEST CURB.

Q. AND, ARE YOU FAMILIAR WITH THE ADDRESS IT WAS IN FRONT OF?

A. YES.

Q. AND, HOW ARE YOU FAMILIAR WITH IT?

A. IT'S AN AREA OF HIGH NARCOTIC ACTIVITY WHERE PERTOSO AND I HAVE PARTICIPATED IN SEVERAL NARCOTIC RELATED ARRESTS.

Q. AND, AS YOU BEGAN TO PROCEED SOUTHBOUND ON 64TH AVENUE, WHAT IF ANYTHING OCCURRED?

A. JUST AS WE TURNED SOUTHBOUND, A COUPLE MEMBERS OF THE GROUP I THINK LOOKED UP AT US AND THEN THEY STARTED RUNNING AND THE CAR TOOK OFF SOUTHBOUND.

Q. AND, WHEN YOU SAY THE CAR TOOK OFF SOUTHBOUND, HOW DID IT DO SO?

A. IT APPEARED TO DRIVE OFF RATHER QUICKLY.

Q. WHEN YOU SAY THE MEMBERS OF THE GROUP TOOK OFF RUNNING, WHAT DIRECTION DID THEY RUN?

A. TWO OF THE PERSONS IN THE GROUP RAN SOUTHBOUND ON 64TH AND THEN RAN IN A WESTBOUND DIRECTION TOWARDS 2663 63RD AVENUE WHICH IS AN APARTMENT COMPLEX, WHICH IS LOCATED THERE AND THEN THE OTHER TWO RAN WESTBOUND TO THE REAR OF AN ABANDONED BURNED HOUSE THAT'S LOCATED JUST NORTH OF 2663.

Q. AT THAT POINT, DID YOU OR OFFICER PERTOSO ACTIVATE ANY EMERGENCY EQUIPMENT?

A. NO.

Q. HAD YOU SAID ANYTHING?

A. NO.

Q. WHAT, IF ANYTHING, OCCURRED NEXT?

A. I PULLED UP TO THE LOCATION WHERE THEY HAD RUN FROM AND THEN OFFICER PERTOSO GOT OUT AND HE RAN NORTHBOUND ON 63RD AND WESTBOUND ON FOOTHILL.

Q. DID YOU THEN LOSE SIGHT OF HIM?

A. YES.

Q. DID YOU GET OUT OF THE CAR?

A. NOT AT THAT TIME, NO.

Q. WHAT, IF ANYTHING, DID YOU DO?

A. I DROVE AROUND THE BLOCK. I DROVE SOUTHBOUND ON 63RD THEN WESTBOUND ON BANCROFT AND NORTHBOUND ON 62ND AVENUE.

Q. WHAT WAS YOUR PURPOSE IN DOING THAT?

A. BASED ON THE ACTIONS THAT WE HAD SEEN AND OUR EXPERIENCE IN THE AREA, WE BELIEVED THAT THERE WAS SOME TYPE OF ILLEGAL ACTIVITY OCCURRING THERE.

Q. ANY PARTICULAR TYPE OF ILLEGAL ACTIVITY?

A. NARCOTIC RELATED.

Q. WHAT WAS YOUR PURPOSE IN DRIVING AROUND THE BLOCK?

A. WE WANTED TO STOP THE INDIVIDUALS WHO HAD RUN AND FIND OUT WHO THEY WERE AND WHAT THEIR PURPOSE WAS FOR BEING THERE IN THE AREA.

Q. WHAT, IF ANYTHING, AS YOU DROVE AROUND THE BLOCK, DID YOU SEE ANYTHING OR HEAR ANYTHING THAT ATTRACTED YOUR ATTENTION?

A. YES.

Q. WHAT, IF ANYTHING, DID YOU HEAR OR SEE?

A. OVER THE RADIO, OFFICER PERTOSO ADVISED ME THAT HE HAD ONE OF THE PEOPLE STOPPED ON FOOTHILL IN ONE OF THE YARDS THERE.

Q. WHAT, IF ANYTHING, DID YOU DO?

A. I DROVE AND I SAW OFFICER PERTOSO. HE HAD DETAINED THE DEFENDANT.

Q. DO YOU SEE THE PERSON OFFICER PERTOSO DETAINED IN THE COURTROOM TODAY?

A. YES.

Q. COULD YOU POINT HIM OUT -- INDICATE WHERE HE'S SITTING?

A. HE'S SITTING AT THE DEFENSE TABLE, MALE BLACK, WEARING TAN JACKET AND BLUE PANTS.

THE COURT: THE RECORD WILL SHOW HE IS INDICATING THE MINOR IN THIS CASE.

MS. KENFIELD: THANK YOU, YOUR HONOR.

BY MS. KENFIELD: Q. WHAT OCCURRED AFTER YOU ARRIVED AT OFFICER PERTOSO'S LOCATION?

A. JERRY HAD THE SUSPECT HANDCUFFED AND HE TOLD ME THAT HE HAD DROPPED A ROCK OF COCAINE -- SUSPECTED COCAINE -- AND JERRY WAS HOLDING THAT IN HIS HAND AND HE PLACED THE SUSPECT UNDER ARREST FOR 11350 OF THE HEALTH AND SAFETY CODE.

Q. DID YOU CONDUCT A SEARCH OF THE AREA ALONG THE ROUTE THAT THE INDIVIDUALS HAD RUN?

A. YES.

Q. DID YOU FIND ANYTHING?

A. YES.

Q. WHAT, IF ANYTHING, DID YOU FIND?

A. I FOUND A CLEAR PLASTIC SANDWICH BAG. INSIDE OF IT WAS SEVERAL SMALL CLEAR ZIP-LOCK BAGS AND APPROXIMATELY I THINK IT'S ABOUT 15 OFF-WHITE COLORED CHUNKS OF SUSPECTED COCAINE.

Q. AND DID OFFICER PERTOSO GIVE YOU THE SUSPECTED CHUNKS OF COCAINE THAT HE HAD RECOVERED?

A. YES.

Q. WHAT DID YOU DO WITH THEM?

A. IT WAS PACKAGED AND THEN PLACED IN THE CRIMINALISTIC ENVELOPE AND LATER TURNED INTO THE CRIMINALISTIC SECTION OF THE OAKLAND POLICE DEPARTMENT.

MS. KENFIELD: YOUR HONOR, I'D LIKE TO HAVE MARKED PETITIONER'S NUMBER ONE, OAKLAND POLICE DEPARTMENT EVIDENCE ENVELOPE WITH THE SUSPECT'S NAME, HODARI DULAN, THE ENVELOPE WITH THE NUMBER D2317-88, THE REPORT 88-44699, AND OFFICER MCCOLGIN'S NAME ON IT. I'D LIKE THAT TO BE MARKED AS PETITIONER'S NUMBER ONE.

THE COURT: EVIDENCE ENVELOPE AND CONTENTS WILL BE NUMBER ONE FOR IDENTIFICATION.

(WHEREUPON PETITIONER'S NO. 1, EVIDENCE ENVELOPE AND CONTENTS WERE MARKED FOR IDENTIFICATION.)

BY MS. KENFIELD: Q. AND, PETITIONER'S NUMBER ONE, DO YOU RECOGNIZE IT?

A. YES, I DO.

Q. WHAT IS THAT?

A. THIS IS THE CRIMINALISTIC ENVELOPE THAT I PLACED SUSPECTED NARCOTICS IN THAT WERE SEIZED THAT NIGHT AND THAT WERE TURNED INTO THE CRIMINALISTIC SECTION OF THE OAKLAND POLICE DEPARTMENT.

Q. I WOULD ASK TO CHECK YOUR SEALS AND TELL ME IF YOUR SEALS ARE STILL IN TACT.

A. YES.

MS. KENFIELD: YOUR HONOR, MAY THE RECORD REFLECT I AM OPENING PETITIONER'S NUMBER ONE AND REMOVING FROM IT A ZIP-LOCK BAGGY THAT IS SEALED WITH AN OAKLAND POLICE DEPARTMENT EVIDENCE STICKER, IT'S NUMBERED NUMBER ONE, THE DATE 5-9-88, CRIMINALISTIC VICE NUMBER D2317-88, .06 GRAMS. THE NUMBERS WRITTEN ON THE ENVELOPE IS 7469P. INSIDE THE ENVELOPE IS A CHUNK OF OFF-WHITE ROCKY MATERIAL.

THE COURT: YOU'RE USING THE WORD ENVELOPE AND YOU'RE ALSO I THINK, WITH REFERENCE TO THE EVIDENCE DOCUMENT.

MS. KENFIELD: THIS WOULD BE A CLEAR GLASSINE ENVELOPE ZIP-LOCK BAGGY.

THE COURT: ALL RIGHT.

MS. KENFIELD: I'D LIKE THAT MARKED 1-A. MAY THE RECORD REFLECT I ALSO REMOVED FROM PETITIONER'S NUMBER 1, AN OLD FASHION PLASTIC BAGGY INSIDE THAT IS SEALED WITH A PIECE OF TAPE, THE INITIAL "L" AND SOMETHING ELSE I CAN'T READ OR "P" I CAN'T READ IT – NUMBER 2, BUT IT IS SEALED WITH A PIECE OF TAPE. INSIDE IS A GLASSINE ENVELOPE CONTAINING A LARGE NUMBER OF OFF-WHITE ROCKY MATERIAL CHUNKS. THAT ENVELOPE IS SEALED ON THE INSIDE WITH AN OAKLAND POLICE DEPARTMENT EVIDENCE STICKER LABELED "2", DATED 5-9-88 – D2317-18, THE NUMBER IS 7.43 GRAMS. ALSO, IN ADDITION TO THE LARGER PLASTIC BAGGY, THERE ARE A NUMBER OF SMALLER ONE BY ONE AND A HALF INCH ZIP-LOCK BAGGIES. TEN OF THEM AND EACH OF THEM CONTAINS AN OFF-WHITE ROCKY MATERIAL.

THE COURT: THAT LARGER PLASTIC BAGGY AND CONTENTS WILL BE 1-B FOR IDENTIFICATION.

(WHEREUPON PETITIONER'S 1-B, LARGER PLASTIC BAGGY AND CONTENTS WERE MARKED FOR IDENTIFICATION.)

BY MS KENFIELD: Q. HANDING YOU 1-A, DO YOU RECOGNIZE THAT?

A. YES.

Q. WHAT IS THAT?

A. THIS IS THE CHUNK OF SUSPECTED COCAINE THAT WAS RECOVERED BY OFFICER PERTOSO AND LATER GIVEN TO ME.

Q. HANDING YOU 1-B, DO YOU RECOGNIZE THAT?

A. YES.

Q. WHAT IS THAT?

A. THIS IS A CLEAR PLASTIC SANDWICH BAG AND INSIDE IT CONTAINS SEVERAL WHITE CHUNKS OF SUSPECTED COCAINE.

Q. WHERE EXACTLY DID YOU FIND THIS OFFICER PERTOSO -- EXCUSE ME, OFFICER MCCOLGIN?

A. I FOUND IT -- I'M NOT SURE THE ADDRESS, IT'S ONE HOUSE NORTH OF 2663 63RD AVENUE. IT'S AN ABANDONED WHITE HOUSE AND IT'S BEEN BURNED DOWN KIND OF. THERE'S A SMALL SET OF STAIRS THAT'S LOCATED ON THE NORTH SIDE OF THIS HOUSE AND THE BAG WAS LYING ON THE BOTTOM STAIR.

Q. AND WHERE WAS THAT IN LOCATION TO WHERE YOU SAW THIS MINOR RUN.

MS. BRICKLEY: YOUR HONOR, I OBJECT TO THIS LINE OF QUESTIONING WITH REGARD TO THIS BAG. MY CLIENT WAS CHARGED -- IS CHARGED WITH AN 11350. IT WAS MY UNDERSTANDING THAT WAS BASED ON THE BAG THAT HE WAS ALLEGEDLY SEEN TO HAVE DROPPED AND NOT ON THIS ONE ROCK THAT HE WAS ALLEGEDLY SEEN TO HAVE DROPPED BUT NOT ON THIS EVIDENCE. I DON'T SEE RELEVANCE OF IT.

THE COURT: WELL, I SEE IT'S QUITE RELEVANT. I DON'T KNOW WHAT YOU'RE UNDERSTANDING WHAT IT'S BASED UPON, BUT IT'S CERTAINLY RELEVANT. IT IF SHOWS HE DROPPED IT, I ASSUME THEY WANT TO ARGUE THAT HE POSSESSED IT BEFORE HE DROPPED IT. GO AHEAD.

MS. BRICKLEY: I'LL RENEW MY OBJECTION.

THE COURT: WELL, IT'S CERTAINLY RELEVANT IF THEY CAN PROVE THE CASE ON THAT. GO AHEAD.

BY MS. KENFIELD: Q. WHERE WAS THE BAGGY WITH RESPECT TO WHERE YOU SAW THE MAN RUN?

A. THE TWO PEOPLE THAT WE SAW RUN, RAN NORTH OF THAT WHITE HOUSE THAT'S BURNED DOWN AND THEY RAN PAST THAT STAIRWELL.

Q. NOW, DID YOU LOSE SIGHT OF THEM AT ANY POINT?

A. YES.

Q. AND, AT WHAT POINT DID YOU LOSE SIGHT OF THEM?

A. WHEN THEY ORIGINALLY RAN AND THEY RAN INTO THE YARD. THERE ARE SEVERAL TREES AND THAT'S WHERE WE LOST SIGHT OF THEM.

Q. WHEN YOU LOST SIGHT OF THEM, WAS OFFICER PERTOSO IN THE CAR OR OUT OF THE CAR?

A. WE WERE JUST PULLING UP. I GUESS JERRY WAS JUST GETTING OUT.

Q. MS. KENFIELD: NO FURTHER QUESTIONS.

THE COURT: CROSS?

<u>CROSS-EXAMINATION</u>

BY MS. BRICKLEY: Q. OFFICER, WHEN YOU SAID THAT THESE FOUR INDIVIDUALS STARTED RUNNING IMMEDIATELY WHEN YOU TURNED THE CORNER THERE --

A. ALMOST IMMEDIATELY, YES.

Q. OKAY. AT THAT POINT, DID YOU RECOGNIZE ANY OF THE INDIVIDUALS?

A. NO.

Q. AND, YOU SAY OFFICER PERTOSO GOT OUT OF THE CAR IN ORDER TO CHASE, AT LEAST CHASE TWO OF THEM THAT HAD GONE IN THE DIRECTION OF THE HOUSE.

A. OKAY.

Q. AND, YOU THEN CONTINUED TO DRIVE THE VEHICLE ALSO TRYING TO CATCH UP WITH THEM?

A. YES.

Q. AND, YOUR PURPOSE WAS TO STOP AND QUESTION THEM?

A. YES.

Q. NOW, THE BAG WITH THE NUMEROUS ROCKS IN IT, DID YOU SEE THAT IN ANYONE'S POSSESSION?

A. NO.

Q. OKAY. DID OFFICER PERTOSO SAY THAT HE HAD SEEN THAT IN ANYONE'S POSSESSION?

A. NO, MA'AM.

Q. OKAY. AND, THE CAR THAT YOU SAW THESE MALE BLACKS STANDING AROUND, WAS A PARKED VEHICLE?

A. IT WAS PARKED WHEN WE SAW IT, YES.

MS. BRICKLEY: NO FURTHER QUESTIONS.

THE COURT: REDIRECT?

REDIRECT EXAMINATION

BY MS. KENFIELD: Q. WHEN YOU DROVE UP TO WHERE YOU STOPPED AND OFFICER PERTOSO – STRIKE THAT.

WITHDRAW THAT. I HAVE NO FURTHER QUESTIONS.

THE COURT: MAY THE WITNESS BE EXCUSED?

MS. KENFIELD: YES.

MS. BRICKLEY: YES.

THE COURT: YOU'RE EXCUSED. OFFICER, WHO IS THE – WHATEVER PROPER TERM, THE DIRECTOR OR COMMANDING OFFICER WHO WAS IN CHARGE OF THE ARRESTING?

THE WITNESS: THAT'S SERGEANT JAMES BEAL, B-E-A-L.

THE COURT: WHAT TELEPHONE NUMBER REACHES HIM?

THE WITNESS: 273-3224.

THE COURT: THANK YOU VERY MUCH. YOU'RE EXCUSED. NEXT WITNESS.

MS. KENFIELD: OFFICER PERTOSO WILL BE COMING IN.

OFFICER JERRY PERTOSO

(HAVING BEEN DULY SWORN, WAS CALLED ON BEHALF OF THE PETITIONER.)

THE CLERK: STATE YOUR NAME, PLEASE.

THE WITNESS: JERRY, J-E-R-R-Y PERTOSO, P-E-R-T-O-S-O.

THE CLERK: THANK YOU.

DIRECT EXAMINATION

BY MS. KENFIELD: Q. OFFICER PERTOSO, YOU'RE EMPLOYED BY THE

OAKLAND POLICE DEPARTMENT S.D.U. 2 TASK FORCE, IS THAT RIGHT?

A. YES.

Q. IS THAT TASK FORCE, IS THAT YOUR CURRENT ASSIGNMENT?

A. YES.

Q. ON APRIL 18, 1988 AT APPROXIMATELY 10:00 P.M., WERE YOU ON DUTY?

A. YES.

Q. WHERE WERE YOU?

A. WE WERE IN THE VICINITY OF 2600 BLOCK OF 63RD AVENUE.

Q. AND, WHICH DIRECTION WERE YOU GOING?

A. WE WERE GOING WESTBOUND ON FOOTHILL.

Q. AND, AS YOU APPROACHED 63RD AVENUE, DID YOU SEE ANYTHING THAT ATTRACTED YOUR ATTENTION?

A. YES.

Q. BY THE WAY, I TAKE IT THAT YOU WERE DRESSED IN STANDARD S.D.U. 2 UNIFORM?

A. YES.

Q. AND, WAS OFFICER MCCOLGIN DRIVING?

A. YES.

Q. WAS THAT VEHICLE MARKED THAT YOU WERE IN, MARKED IN ANY WAY?

A. NO.

Q. WHAT DID YOU SEE?

A. AS WE GOT TO THE CORNER OF 63RD AVENUE AND FOOTHILL, WE WENT IN A SOUTHBOUND DIRECTION AND WE NOTICED THAT FOUR YOUNG GUYS HUDDLED AROUND THE RIGHT SIDE OF A RED CAR.

Q. AND, AS YOU CONTINUED TO MAKE THE TURN, WHAT IF ANYTHING HAPPENED?

A. A COUPLE OF GUYS LOOKED UP TOWARDS US AND TWO OF THEM RAN LIKE IN AN SOUTHBOUND DIRECTION TO THE REAR OF AN APARTMENT COMPLEX THAT'S AT 2663, AND TWO OF THE OTHER FELLAS RAN WESTBOUND IN THE REAR OF LIKE AN ABANDONED WHITE HOUSE THAT'S BURNED OUT – I THINK IT'S 2665 63RD AVENUE.

Q. WHAT, IF ANYTHING ELSE OCCURRED?

A. I ENDED UP ARRESTING THIS MAN OVER HERE.

Q. LET ME BACK UP. DID YOU SEE THE CAR DO ANYTHING?

A. YES.

Q. WHAT DID THE CAR DO?

A. IT PROCEEDED SOUTHBOUND AT A HIGH RATE OF SPEED AFTER THE OTHERS RAN.

Q. HOW FAR WERE YOU FROM THE CAR AT THE TIME THE FOUR BOYS RAN AND THE CAR DROVE OFF?

A. PROBABLY ABOUT 40 YARDS OR SO.

Q. HOW WOULD YOU DESCRIBE THE MANNER IN WHICH THE RED CAR DROVE OUT?

A. OFF IN A HIGH RATE OF SPEED AS IF TO GET OUT OF THE AREA AS QUICKLY AS POSSIBLE.

MS. BRICKLEY: I WOULD OBJECT TO THE LATER PART AS BEING AN OPINION.

MS. KENFIELD: IT WAS NOT RAISED AS A CONCLUSION.

THE COURT: HIS RESPONSES, "OFF IN A HIGH RATE OF SPEED" WILL STAY IN. THE REST OF IT WILL GO OUT.

BY MS. KENFIELD: Q. WHAT, IF ANYTHING, DID YOU AND OFFICER MCCOLGIN DO NEXT?

A. I GOT OUT OF MY CAR AND RAN NORTHBOUND ON 63RD AVENUE.

Q. DID YOU RUN THE SAME WAY YOU SAW THE -- ANY OF THE PEOPLE RUN?

A. NO.

Q. WHAT DID YOU BELIEVE HAD JUST OCCURRED?

A. BASED ON THE AREA AND MY OBSERVATIONS, I BELIEVE THAT WE INTERRUPTED SOME TYPE OF NARCOTIC ACTIVITY.

Q. AND, HAD YOU WORKED IN THIS AREA BEFORE?

A. YES, I'VE PARTICIPATED IN NUMEROUS ARRESTS FOR SALES OF NARCOTICS, POSSESSION OF NARCOTICS FOR SALE AT THE SAME LOCATION WHERE I SAW THESE GUYS.

Q. AND, WHEN YOU GOT OUT OF THE CAR, WERE YOU ABLE TO SEE ANY OF THE INDIVIDUALS?

A. NO, I COULDN'T SEE THEIR FACES.

Q. WHEN WAS IT THAT YOU AND OFFICER MCCOLGIN -- STRIKE THAT. DID YOUR CAR STOP?

A. JUST FOR A BRIEF SECOND.

Q. BY THE TIME YOU HAD GOTTEN OUT OF THE CAR, ALL THE INDIVIDUALS WERE OUT OF SIGHT?

A. YES.

Q. WHEN YOU GOT OUT OF THE CAR AND YOU RAN, WHERE DID YOU RUN TO?

A. I RAN TO THE EAST SIDE OF I THINK IT'S 6225 FOOTHILL.

Q. HOW DID YOU GET THERE?

A. I RAN NORTHBOUND ON 63RD AVENUE AND WESTBOUND ON TO FOOTHILL.

Q. AND, AS YOU WENT EASTBOUND ALONG 6225 FOOTHILL, DID YOU SEE ANYTHING THAT ATTRACTED YOUR ATTENTION?

A. I NOTICED THIS MAN SEATED AT DEFENSE TABLE IN A TAN JACKET AND BLUE JEANS. HE WAS RUNNING NORTHBOUND TOWARDS ME BUT HE WAS LOOKING OVER HIS SHOULDER AS IF TO BE LOOKING FOR SOMEONE TO FOLLOW HIM.

Q. MS. KENFIELD: MAY THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE MINOR IN THIS ACTION.

THE COURT: YES.

BY MS. KENFIELD: Q. WHAT, IF ANYTHING, OCCURRED AS YOU SAW THIS MINOR RUNNING AND LOOKING BEHIND HIM?

A. WELL, AS I GOT ABOUT FROM WHERE I AM TO WHERE HE'S SEATED, IN LIKE -- IN A UNDERHAND SCOOPING MOTION WITH

THE RIGHT HAND, HE DISCARDED A SINGLE LOOSE ROCK TO THE SIDEWALK ALONG THE SIDE OF THE HOUSE.

MS. KENFIELD: YOUR HONOR, INDICATING.

THE COURT: HOLD IT JUST A MOMENT. THE DISTANCE BETWEEN THE WITNESS AND THE MINOR IS ABOUT 11 FEET. ALL RIGHT. GO AHEAD.

BY MS. KENFIELD: Q. HAD YOU SAID ANYTHING TO THE MINOR AT THAT POINT?

A. NO.

THE COURT: I'M SORRY, YOU SAID WHEN YOU GOT ABOUT THAT DISTANCE YOU SAW HIM DO WHAT?

THE WITNESS: HE DISCARDED A LOOSE ROCK TO THE GROUND WITH HIS RIGHT HAND IN A BACKWARD MOTION.

THE COURT: ALL RIGHT. YOU MAY CONTINUE.

BY MS. KENFIELD: Q. HAD YOU SAID ANYTHING TO HIM AT THAT POINT?

A. NO.

Q. HAD YOU DONE ANYTHING AT THAT POINT OTHER THAN YOUR BEING WHERE YOU ARE?

A. NO.

Q. WHAT DID YOU DO AT THAT POINT?

A. AT THAT POINT, HE CONTINUED TOWARDS ME. I FORCED HIM ON TO THE GRASS AND HANDCUFFED HIM.

Q. WHEN HE THREW THE ROCK, DID YOU HAVE ANY SUSPICION AS TO WHAT THAT WAS?

A. IT WAS IDENTIFIED AS BASE ROCK COCAINE.

Q. AT ANY POINT, DID YOU RETRACE THE ROUTE FROM WHERE YOU SAW THE MINOR DISCARD THE SUSPECTED COCAINE TO WHERE YOU INITIALLY SAW THE MINOR?

A. MY PARTNER DID.

Q. HOW MUCH TIME ELAPSED BETWEEN THE TIME THAT YOU INITIALLY SAW THE MINOR AND THE TIME YOU SAW HIM DISCARD THE ROCK OF COCAINE?

A. OH, LESS THAN A MINUTE.

Q. MS. KENFIELD: NO FURTHER QUESTIONS.

THE COURT: CROSS?

<u>CROSS-EXAMINATION</u>

BY MS. BRICKLEY: Q. OFFICER, YOU SAY YOU SAW FOUR YOUNG MEN HUDDLED AROUND A CAR. BY HUDDLED, YOU MEAN THEY WERE STANDING AROUND THE CAR?

A. YES.

Q. YOU DIDN'T SEE ANY MONEY?

A. NO.

Q. YOU DIDN'T SEE ANY DRUGS?

A. NO.

Q. OKAY. YOU SAID THE CAR TOOK OFF AT A HIGH RATE OF SPEED. ABOUT APPROXIMATELY HOW FAST WAS THAT CAR GOING?

A. I COULDN'T PACE IT BUT IT TOOK OFF FROM A PARKED POSITION AT AN UNREASONABLE SPEED FOR THE AREA.

Q. AND, APPROXIMATELY, WHAT WOULD THAT SPEED BE?

A. WELL, I COULDN'T TELL YOU.

Q. SO, IT WAS JUST OVER THE SPEED LIMIT?

A. I DON'T THINK IT REACHED 25 AT THE STOP SIGN, BUT IT TOOK OFF UNREASONABLY FAST FOR WHAT HE WAS PARKED AT.

Q. WHEN YOU GOT OUT OF THE CAR, YOU WERE RUNNING AFTER THESE INDIVIDUALS, IS THAT CORRECT?

A. NO, I DIDN'T FOLLOW THOSE GUYS AT ALL.

Q. BUT YOU WERE RUNNING IN ORDER TO CUT THEM OFF?

A. OH, YES.

Q. YOUR INTENTION WAS TO TRY TO DETAIN THESE INDIVIDUALS?

A. YES, I WANTED TO CONTACT THEM AND FIND OUT WHAT THEY WERE ABOUT.

Q. OKAY. AND, YOU SAW TWO GOING TOWARDS THIS ABANDONED HOUSE, IS THAT CORRECT?

A. YES.

Q. OKAY. AND, THAT WAS WHAT DIRECTION WERE THOSE TWO RUNNING THEN?

A. THEY WOULD BE RUNNING IN A WESTBOUND DIRECTION.

Q. ON WHAT STREET?

A. OFF OF 63RD AVENUE.

Q. OFF. SO, THEY WEREN'T ON THE STREET, THEY WERE RUNNING TOWARDS A HOUSE?

A. WELL, THEY WERE INITIALLY ON THE STREET THEN THEY RAN THROUGH A LITTLE CYCLONE FENCE -- THERE'S A GATE, AND THEN THEY RAN IN A WESTBOUND DIRECTION OUT OF MY SIGHT.

Q. OKAY. AND, UM -- OFFICER MCCOLGIN PROCEEDED IN HIS CAR ALSO TRYING TO FOLLOW THEM OR CUT THEM OFF, IS THAT CORRECT?

A. I CAN'T SAY EXACTLY WHAT HIS INTENTIONS WERE. HE DROVE SOUTHBOUND ON 63RD AVENUE., I GOT OUT OF THE CAR.

Q. OKAY. SO, WHEN YOU GOT SIGHT OF -- LOST SIGHT OF THE MINOR HERE, WHERE WERE YOU?

A. I HAD NOT EVEN GOTTEN OUT OF THE CAR YET.

Q. I MEAN WHEN YOU SAW HIM. LET ME STRIKE THAT. WHEN YOU SAW HIM DISCARD THE OBJECT, WHERE WERE YOU?

A. I WAS ON THE EAST SIDE OF 6225 FOOTHILL.

Q. WHERE WERE YOU STANDING?

A. ON THE SIDEWALK AREA OF THE HOUSE.

Q. OKAY. AND, YOU SAID THE INDIVIDUAL WAS LOOKING OVER HIS SHOULDER?

A. HE WAS LOOKING BACK INITIALLY AND WHEN HE SAW ME, HE HAD A STARTLED LOOK ON HIS FACE.

Q. OKAY. AND, WERE YOU STILL RUNNING AT THAT TIME?

A. PARDON?

Q. WERE YOU STILL RUNNING WHEN YOU SAW HIM DISCARD THE OBJECT?

A. YES, I WAS.

Q. MS. BRICKLEY: I DON'T HAVE ANY OTHER QUESTIONS.

THE COURT: REDIRECT?

MS. KENFIELD: NOTHING FURTHER.

THE COURT: JUST A MOMENT. YOU SAID HE LOOKED UP, APPARENTLY SAW YOU AND GOT A STARTLED LOOK ON HIS FACE. HAD HE ALREADY THROWN THE ROCK DOWN WHEN HE LOOKED AT YOU WITH THAT STARTLED LOOK OR DID HE THROW THE ROCK DOWN AFTER HE LOOKED AT YOU WITH THAT STARTLED LOOK?

THE WITNESS: IT WAS AFTER HE LOOKED AT ME.

THE COURT: AND, AT THE TIME THAT YOU WERE RUNNING, WHEN HE GOT THAT STARTLED LOOK ON HIS FACE, WERE YOU RUNNING TOWARDS HIM?

THE WITNESS? YES, I WAS RUNNING TOWARDS HIM.

THE COURT: THE COURT HAS NO FURTHER QUESTIONS. OTHER QUESTIONS BY COUNSEL?

MS. KENFIELD: NOTHING FURTHER.

MS. BRICKLEY: NOTHING.

THE COURT: MAY THE WITNESS BE EXCUSED?

MS. KENFIELD: WELL, NO. HE'S GOT TO WAIT.

THE COURT: ALL RIGHT. YOU MAY STEP DOWN. NEXT WITNESS?

MS. KENFIELD: NO FURTHER WITNESSES.

THE COURT: MS. BRICKLEY?

MS. BRICKLEY: WELL, TO ME THIS SEEMS LIKE A PRETTY CLEAR CUT CASE OF --

THE COURT: ARE YOU OFFERING THE EVIDENCE?

MS. BRICKLEY: NO, I'M SORRY. I'M JUST ARGUING. I'M SORRY. TO ME, THIS SEEMS LIKE A PRETTY CLEAR CUT CASE OF A THREAT OF AN ILLEGAL DETENTION A MENIFEE TYPE ISSUE WHERE THE DETENTION WAS SO CLEARLY UNLAWFUL. THERE ARE A NUMBER OF CASES WHICH ARE VERY CLOSE AND THERE'S ONE WHICH IS DIRECTLY ON POINT AND THE FACTS ARE ALMOST IDENTICAL TO THIS CASE AND THAT IS A VERY RECENT CASE OF PEOPLE VERSUS WASHINGTON AT 192: CAL.APP.3D: 1120. I HAVE A COPY OF THAT CASE AND IN THAT CASE, THE OFFICER OBSERVED A GROUP OF MEN, AGAIN HUDDLED IN A FORMATION WITH A LOT OF HAND MOVEMENTS, SO THERE'S EVEN THAT ADDITIONAL ELEMENT IN THAT CASE. THE GROUP LOOKED AT THE OFFICER, STARTED TO WALK AWAY AT A FAST PACE. THE OFFICER FOLLOWED AND THEN THE DEFENDANT IMMEDIATELY RAN AWAY AND DISCARDED AN OBJECT. AND, THE COURT HELD THAT THAT WAS A THREAT OF AN ILLEGAL DETENTION. THE FACT THAT IT WAS A HIGH NARCOTICS AREA DID NOT MATTER.

THERE'S NUMEROUS CASES THAT SAY THAT IS NOT SUFFICIENT REASON TO STOP

PEOPLE. IN THIS CASE, THERE WAS SIMPLY SOME BOY STANDING AROUND A CAR, PARKED CAR, THE CAR WASN'T DOING ANYTHING ILLEGAL. THEY'RE STANDING AROUND A CAR AND THESE OFFICERS REACHED A CONCLUSION FROM THAT THAT THERE MAY BE SOME DRUG ACTION GOING ON AND THEY GO CHASING THESE INDIVIDUALS AND THE MINOR CLEARLY DROPS THE OBJECT AND RESPONDS TO THAT, THAT HE SEES THE OFFICER, IS STARTLED AND DROPS THE OBJECT. IT'S CLEARLY IN RESPONSE TO THIS THREAT OF DETENTION. THE OFFICERS ARE QUITE FRANK THAT THAT WAS THEIR INTENTION TO DETAIN THESE INDIVIDUALS.

TO ME, THERE ARE NO ARTICULATE FACTS. IT MAY HAVE BEEN A HUNCH, BUT THAT'S NOT SUFFICIENT. THERE WERE NO ARTICULATE FACTS TO JUSTIFY A DETENTION AT THAT POINT. THERE ARE A NUMBER OF OTHER CASES THAT ARE NOT AS CLOSE AS WASHINGTON BUT VERY SIMILAR SITUATIONS WHERE SOMEBODY RUNS AWAY OR TRYS TO AVOID A POLICE OFFICER AND THE COURTS HOLD THAT THAT'S NOT SUFFICIENT.

THOSE WOULD BE PEOPLE VERSUS ALDRIDGE, CALIFORNIA SUPREME COURT CASE THAT ADDRESSES THE ISSUE; 35; CAL.APP.3D 473 AND THAT CASE IS A GROUP. AN OFFICER SUSPECTS -- SEES A GROUP, AGAIN STANDING AROUND. THEY SUSPECT IN AN AREA WHERE THERE ARE DRUG TRANSACTIONS AND PEOPLE WITH WEAPONS. THEY SUSPECT IN AN AREA WHERE THERE ARE DRUG TRANSACTIONS AND PEOPLE WITH WEAPONS. THEY SUSPECT SOMEBODY IN THE GROUP MAY HAVE DRUGS OR ILLEGAL WEAPONS. THE GROUP STARTS TO DISBURSE AS THE POLICE CAR COMES IN THE LOT. FOUR MEN, INCLUDING THE DEFENDANT FIRST WALK AND THEN RUN. THE COURT AGAIN SAYS NOT ENOUGH. WE CANNOT DETAIN UNDER THOSE CIRCUMSTANCES. A PERSON HAS A RIGHT TO AVOID A POLICE OFFICER. IN THIS CASE, THE ONLY THING I

SEE IS THE FACT THAT THESE PEOPLE HAVE RUN FROM THE POLICE OFFICER AND IT MAY BE -- THIS CAR TAKES OFF AT A HIGH RATE OF SPEED WHICH THE OFFICER CAN'T SAY EXACTLY WHAT THAT SPEED IS. I THINK THE CASES ARE EXTREMELY CLEAR THAT THAT IS NOT SUFFICIENT GROUNDS FOR A DETENTION AND THAT IS WHAT WAS HAPPENING HERE, WAS AN ATTEMPT TO MAKE A DETENTION WHICH RESULTED IN THE DISCARDING.

ON ADDITIONAL CASE I WOULD JUST GIVE THE COURT IS WILKINS, WHICH IS 186: CAL.APP.3D 804. THAT IS ALSO A FAIRLY RECENT CASE. ACTUALLY THAT'S A 1986 CASE. BUT, AGAIN THAT TALKS ABOUT AVOIDING THE POLICE OFFICER.

THE COURT: MS. KENFIELD?

MS. KENFIELD: YOUR HONOR, IN ADDITION TO THE MENIFEE CASE, WHICH IS A LINE THAT'S TOTALLY CONTRARY, THAT'S THE LINE OF CASE OF PATRICK, WHICH IS 135 CAL.APP.3D 290, WHICH REACHES A CONTRARY CONCLUSION TO MENIFEE.

THE COURT: I'M SORRY, CAL.APP.3D 290?

MS. KENFIELD: YES.

THE COURT: AND, THE NAME OF THE CASE IS WHAT?

MS. KENFIELD: PATRICK. I'M WELL AWARE OF THE WASHINGTON CASE AND I WOULD NOT SAY THE PEOPLE DO NOT HAVE A RIGHT TO AVOID POLICE OFFICERS. BUT, I THINK THE FACTS HERE ARE CLEARLY TANGIBLE THAN IN WASHINGTON.

IN THE WASHINGTON CASE, THE POLICE OFFICER GOT OUT OF THE CAR, WALKED TOWARDS THEM AND GREETED THE INDIVIDUALS. HERE, WHAT HAPPENS IS THE GROUP OF INDIVIDUALS GET OUT, LOOK UP, SEE THE CAR AS IT'S TURNING THE CORNER,

40 OR 50 YARDS AWAY AND RUN IN ALL DIRECTIONS. WHAT HAPPENS NEXT IS THEY LOSE SIGHT OF -- THE OFFICERS TOTALLY LOSE SIGHT OF ALL OF THESE INDIVIDUALS PRIOR TO THE TIME THEY EVEN GET OUT OF THE CAR. THEY PULL UP AND BY THE TIME THE OFFICER IS GETTING OUT OF THE CAR, HE'S LOST SIGHT OF THESE INDIVIDUALS WHICH WOULD MEAN THEY LOST SIGHT OF HIM. I THINK PETITIONER'S 1-B IS EXTREMELY IMPORTANT HERE BECAUSE IT SHOWS THAT THEY ARE JUST GUYS GUARDING COCAINE LIKE RIGHT AND LEFT NOT AS A RESULT OF THREAT OF ILLEGAL DETENTION, BUT BECAUSE THEY ARE RUNNING IN FEAR THAT THEY HAVE --

THE COURT: WHY DID YOU THINK THEY WERE THROWING AWAY COCAINE?

MS. KENFIELD: I DON'T KNOW. THEY DON'T WANT TO GET CAUGHT WITH IT.

THE COURT: BY WHOM?

MS. KENFIELD: BY THE POLICE.

THE COURT: OF COURSE.

MS. KENFIELD: BUT THE POLICE HAVEN'T DONE ANYTHING AT THE TIME THIS STUFF IS BEING THROWN AWAY TO LEAVE ANY REASONABLE PERSON TO BELIEVE THAT THEY ARE GOING TO BE DETAINED.

THE COURT: THEY HAVEN'T. THEY STOP THE CAR, ONE COP GETS OUT.

MS. KENFIELD: AS THAT COP IS GETTING OUT, HE CAN'T SEE ANYBODY THAT'S DOING ANYTHING.

THE COURT: THAT THE COURT CAN SEE.

MS. KENFIELD: THERE'S NO EVIDENCE AS TO WHAT THEY CAN SEE.

THE COURT: WAIT A MINUTE. DON'T WE HAVE IN EVIDENCE THAT THE COP GOT OUT AND WENT ON A TANGENT TO CUT THEM OFF? IS THAT WHAT HE SAID HE WAS TRYING TO DO?

MS. KENFIELD: YES, THAT'S WHAT HE SAID HE WAS TRYING TO DO.

THE COURT: DO YOU THINK HE WAS THE ONLY ONE WHO WOULD KNOW THAT?

MS. KENFIELD: WELL, YOUR HONOR, IF HE DOESN'T DO ANYTHING THAT THESE KIDS SEE, THEN WHAT THEY KNOW IS IMPORTANT BECAUSE IT'S NOT A STANDARD WHERE WE'RE LOOKING AT. WE'VE GOTTEN AWAY FROM THE STANDARD OF WHERE IT IS IN THE KIDS IN THE OFFICER'S MIND WERE HIS INTENTIONS.

THE COURT: GETTING UP TO THE POINT JUST BEFORE HE APPREHENDED THE MINOR. HE'S RUNNING TOWARDS THE MINOR.

MS. KENFIELD: THE MINOR IS RUNNING TOWARD HIM.

THE COURT: WHY IS HE RUNNING TOWARDS THE MINOR?

MS. KENFIELD: HE SAID HE WAS RUNNING TO DETAIN THE MINOR.

THE COURT: OF COURSE, THAT'S WHAT HE SAID.

MS. KENFIELD: BUT, HE DOESN'T DO ANYTHING TO COMMUNICATE THAT INTENTION TO THE MINOR.

THE COURT: EXCEPT RUN TOWARDS HIM.

MS. KENFIELD: BUT THE MINOR ISN'T SAYING -- THERE'S NO EVIDENCE THAT THE MINOR SAYS, "I THOUGHT HE WAS GOING TO DETAIN ME." HE HASN'T SAID HE STOPPED.

HE HASN'T DONE ANYTHING LIKE THAT AND AN OFFICER WALKING TOWARDS SOMEONE OR RUNNING TOWARDS SOMEONE DOES NOT BY ITSELF, MEAN THEY'RE GOING TO DETAIN THAT INDIVIDUAL.

THE COURT: GIVE ME SOME AUTHORITY, BECAUSE I READ THIS WASHINGTON CASE, TOO. IT'S BEEN A MILLION YEARS, BUT I'VE READ MENIFEE SOMETIME ALSO.

MS. KENFIELD: THE PATRICK CASE IS ONE.

THE COURT: YES, I READ THAT. I'LL READ IT AND FIND OUT AND I WILL ALSO READ THIS SUPREME COURT CASE THE ALDRIDGE THAT DEFENSE COUNSEL CITES. CERTAINLY, PATRICK DOESN'T PROPORT TO OVERRULE SUPREME COURT.

MS. KENFIELD: NO, BUT IT DOES – THE ALDRIDGE FACTS ARE SIGNIFICANT THAN THE FACTS IN BOTH PATRICK AND MENIFEE. IN PATRICK AND MENIFEE, THE COURT -- BOTH CASES CITE ALDRIDGE, BUT THEY TAKE IT IN TWO DIFFERENT DIRECTIONS.

MS. BRICKLEY: COULD I SAY JUST --

THE COURT: WAIT, I'LL GIVE YOU REBUTTAL.

MS. KENFIELD: BUT, I THINK THE FACTS IN THIS CASE DO NOT AMOUNT TO ILLEGAL DETENTION OR EVEN COUNSEL DOESN'T CALL IT ILLEGAL DETENTION. SHE CALLS IT A THREATENED ILLEGAL DETENTION AND I DON'T THINK THAT THE EVIDENCE SHOULD BE SUPPRESSED.

THE COURT: SUBMITTED?

MS. KENFIELD: YES.

THE COURT: REBUTTAL?

MS. BRICKLEY: I'M FAMILIAR WITH THAT PATRICK CASE AND YOU KNOW THE FACTS ARE SLIGHTLY DIFFERENT. THERE CLEARLY WAS A DIFFERENCE OF OPINION BETWEEN THE TWO DISTINCTIONS BETWEEN PATRICK AND MENIFEE IN THE OPINION OF WHETHER A THREATENED ILLEGAL DETENTION IS A THREAT OF AN ILLEGAL DETENTION AND IS IT SUFFICIENT TO SUPPRESS THE EVIDENCE. HOWEVER, I THINK THE FACT THAT THE CASES THAT HAVE FOLLOWED THE MENIFEE CASE – I DON'T SEE ANY PATRICK CASES THAT WAS FILED THE PATRICK REASON PEOPLE – BEING WASHINGTON BEING ONE OF THEM. ALSO WE JUST RECENTLY GOT A MEMO IN OUR OFFICE FROM SCOTT SPEAR, WHO DOES THE SEARCH AND SEIZURE WORK IN OUR OFFICE, WHICH CITES A NUMBER OF CASES WHICH SHOWS THAT ALL THE OTHER STATES AND THE FEDERAL SYSTEM HAS BEEN FOLLOWING THE MENIFEE REASONING. I DOUBT IF YOU'RE INTERESTED IN THOSE CASES – I'LL GIVE THEM TO YOU. I DON'T EVEN HAVE THE NEW YORK SUPERIOR CASES AND SOME OTHER CASES, BUT THE POINT IS THAT THAT TYPE OF REASONING HAS BEEN FILED. PATRICK IS THE ONLY CASE I'M AWARE OF THAT COULD EVEN BE INTERPRETED OF NOT FOLLOWING MENIFEE.

THE COURT: WAS PATRICK TAKEN UP? WAS IT TAKEN UP TO THE SUPREME COURT?

MS. BRICKLEY: IF IT WAS, THEY DIDN'T ACCEPT IT.

THE COURT: ALL RIGHT. WELL, I'LL DECLARE A RECESS AND TAKE A LOOK AT PATRICK AND ALDRIDGE AND SEE WHERE WE ARE. WE'LL TAKE A RECESS.

(RECESS TAKEN.)

THE COURT: BACK ON THE RECORD IN THE MATTER OF HODARI DULAN. ALL PARTIES AND ATTORNEYS HAVE APPEARED IN COURT.

ALL RIGHT. I WANT TO REROPE THE DISCUSSIONS ON THAT A LITTLE BIT. LET ME TELL YOU HOW MY THINKING IS. I REVIEWED SOME OF THESE CASES, ONES THAT YOU HAVE CITED AS WELL AS OTHER CASES WHICH ARE CITED IN THE CASES THAT YOU HAVE GIVEN TO ME. I AGREE WITH THE DISTRICT ATTORNEY'S VIEW THAT PATRICK SIMPLY REASONS A DIFFERENT CONCLUSION FROM WASHINGTON -- JUST DIVERSION REVIEWS FROM TWO COURTS OF APPEAL.

SO, THEN I WENT TO THE SUPREME COURT -- STATE SUPREME COURT TO DETERMINE WHAT THEIR VIEWS ARE. I ALSO NOTE THAT BOTH OF THESE CASES ARE CITED, AT LEAST ONE OF THE SUPREME COURT CASES ARE IN SUPPORT OF THEIR POSITION. I'M THINKING ABOUT THE ALDRIDGE CASE. THE SUPREME COURT SAYS THAT MORE THAN ONE OF THESE COURTROOM APPEAL CASES IS CITED IN SUPPORT OF SOME OF ONE OF THEIR POSITIONS OR THE OTHER.

NOW, WHAT I GET IN WASHINGTON IS NOT ONLY WAS THE CHASE BY THE POLICE A VIOLATION, BUT THEY DETERMINED THE QUALITY OF THE VIOLATION AND ON PAGE 1128, HE SAID SUCH AN EGREGIOUS VIOLATION OF THE FOURTH AMENDMENT SUPPORTS THE APPLICATION EXCLUSIONARY RULE AND SAID THE EVIDENCE IS TO BE SUPPRESSED. BUT, APPARENTLY AS I'M READING IT, IT'S BASED UPON THE EGREGIOUSNESS OF THE VIOLATION AND THAT WAS THAT THEY WERE CHASING THE DEFENDANT IN THAT CASE AND HE THROUGH THE STUFF DOWN. THEY WERE CHASING HIM PRIMARILY ON SIMPLY BECAUSE OF HIS RACE, BECAUSE HE WAS BLACK AND THEY WEREN'T SITTING STILL FOR THAT. I HAVE -- I DON'T FIND THAT HERE, BUT THE PRINCIPLE REASON WHY JUST BECAUSE HE WAS BLACK -- WHAT I'M GETTING FROM THE TESTIMONY HERE IS THAT THESE ARE WHAT WE CALL POLICE KIND OF STUFF.

I DON'T HAVE ANY DOUBT WITH THE FACT THAT THE CHASE WAS ILLEGAL. I DON'T HAVE ANY QUESTION FINDING THAT. THEY HAD NO RIGHT TO CHASE HIM AND THEY CERTAINLY HAD NO RIGHT TO DETAIN HIM. THIS MINOR -- OR WHAT I'M HAVING SOME DIFFICULTY IS I THINK IT'S IN ALDRIDGE AND ALDRIDGE PAGE 477, DEFINES WHAT CONSTITUTES A DETENTION AND IT SAYS THAT A DETENTION OCCURS QUOTES, "WHENEVER A POLICE OFFICER ACCOSTS AN INDIVIDUAL AND RESTRAINS HIS FREEDOM TO WALK AWAY," AND THEY CITED TERRY AGAINST OHIO FOR THAT PROPOSITION, "OR WHEN AN OFFICER STOPS AN INDIVIDUAL BECAUSE HE SUSPECTS THAT PERSON MAY BE PERSONALLY INVOLVED IN SOME CRIMINAL ACTIVITY" -- AND THOSE ARE THE TWO KINDS OF ACTIVITY WHICH ARE DEFINED BY THE STATE SUPREME COURT AS CONSTITUTING A DETENTION.

THERE'S NO QUESTION WITH WHAT WE HAVE HERE THAT THERE WAS NO ACTUAL DETENTION UNTIL AFTER THE MINOR OR THE INDIVIDUAL BEFORE ME, DISCARDED THE OBJECT. THE SUPREME COURT CERTAINLY IN ALDRIDGE, DOES NOT SPEAK TO A THREATENED DETENTION. THEY SPEAK TO AN ACTUAL DETENTION AND WHAT YOU'RE FLOWING FROM THAT.

TRUE, THERE ARE SOME COURT OF APPEAL CASES OF COURSE THAT INCLUDING WASHINGTON, THAT ARE SPEAKING TO A THREATENED DETENTION AND WHAT I DIDN'T DO -- LET ME BACK UP A MINUTE. PART OF THE ANALYSIS THAT I READ THROUGH THESE CASES IS IF THE FINDER OF FACT CAN MAKE A DETERMINATION THAT THE DISCARDING OF THE EVIDENCE WAS AN INTRINSIC PART OF THE ILLEGAL ACT THAT WAS ENGAGED IN BY THE POLICE AND I KEEP RUNNING UP AGAINST A STONE WALL IN THAT REGARD, EXCEPT IN THIS WASHINGTON CASE WHERE THERE'S SIMPLY TALK ABOUT EGREGIOUSNESS OF VIOLATIONS. THEY STILL DON'T TALK ABOUT WHAT'S BOTHERING ME.

LET ME -- YOU GUYS RESPOND TO THIS: FIRST OF ALL, THE POLICE HAD NO BUSINESS CHASING HIM AT ALL. THEY HAD NO RIGHT TO DETAIN, THEY HAD NO RIGHT TO CHASE HIM. IT APPEARS THAT THE MOTION IS MADE ON THE SUPPOSITION THAT IF THE MINOR HADN'T THROWN THE STUFF AWAY, WHEN THE POLICE CAUGHT UP WITH HIM THEY WOULD HAVE SEARCHED HIM ILLEGALLY AND WOULD HAVE OBTAINED THE ILLEGAL SUBSTANCE. THAT APPEARS TO BE THE BASIS UPON WHAT YOU'RE SAYING. WELL, YOU'RE SHAKING YOUR HEAD, BUT I CERTAINLY WILL GIVE YOU A CHANCE TO TALK. THAT'S THE WAY IT APPEARS TO ME, THAT SOMEBODY IS SAYING HE THREW THE STUFF AWAY. HE THREW AWAY ONLY BECAUSE HE REASONABLY BELIEVED THAT HE WAS GOING TO BE NOT ONLY CHASED, BUT HE WAS PHYSICALLY GOING TO BE DETAINED AND THEN HE WAS GOING TO BE SEARCHED AND THEN THEY WOULD HAVE FOUND THE STUFF. AND, SOMEHOW, THAT APPEARS TO BE WORKED OUT FROM DEFENSE'S POINT OF VIEW AS EITHER JUSTIFYING THE DISPOSITION OF THE OFFENSE OR IF NOT JUSTIFYING IT -- AT LEAST SAYING THIS IS A REASONABLE EXPECTATION TO BE DONE TO SUCH AN EXTENT THAT THE COURT OUGHT TO REPRESS ITS USE IN EVIDENCE IN ORDER TO DISSUADE THE POLICE FROM THIS ILLEGAL ACTIVITY OF CHASING PEOPLE WITHOUT CAUSE. WHAT BOTHERS ME IS IT DOESN'T APPEAR TO BE NECESSARY FOR THE MINOR TO THROW THE STUFF DOWN BECAUSE HE'S BEING ILLEGALLY CHASED BY A COP. HE CAN JUST KEEP THE STUFF IN HIS POCKET.

SUPPOSE THE COP DOES WHAT THE MINOR THINKS HE'S GOING TO DO. SUPPOSE HE CATCHES HIM, DETAINS HIM AND SEARCHED HIM BECAUSE HE RAN AWAY AND HE FINDS THE DOPE ON HIM. THAT WOULD CLEARLY BE A VIOLATION OF THE FOURTH AMENDMENT, THE RIGHT TO PRIVACY FROM MY POINT OF VIEW, SO THAT EVEN IF THE OFFICER FOUND IT ON HIS PERSON PURSUANT

TO THAT SEARCH ON A MOTION TO SUPPRESS, TO MY KNOWLEDGE, IT WOULD BE SUPPRESSED.

HOW COME IF THAT'S THE CASE, THEN WHY IS IT NECESSARY BEFORE THE MINOR IS DETAINED PHYSICALLY AND BEFORE HE IS SEARCHED, WHY IS IT NECESSARY FOR HIM TO THROW THE STUFF AWAY? AND, WHY IS IT THAT THE COURT OUGHT TO STAY BECAUSE THE MINOR DID THAT ON HIS OWN BECAUSE HE THOUGHT HE WAS GOING TO BE DETAINED AND SEARCHED BECAUSE HE DID IT ON HIS OWN, THAT THAT OUGHT TO ALSO BE SUPPRESSED? I HAVE GREAT DIFFICULTY REACHING THAT AND I DON'T SEE WHERE MY CASE THAT I'VE READ UP TO NOW DEALS WITH THAT AND I'D LIKE TO HEAR WHAT YOU HAVE TO SAY ABOUT IT AND IF NECESSARY, WE CAN PUT IT OVER AND YOU GUYS COULD DO SOME WORK -- WRITE MEMOS ON IT. YOU CAN GO FIRST, MS BRICKLEY.

MS. BRICKLEY: WELL, I THINK THE BALL IS IN MY COURT NOW. WELL, A NUMBER OF POINTS AND RESPONSES: I THINK I UNDERSTAND WHAT YOU'RE CONCERN IS IN RESPONSE TO THAT. FIRST OF ALL, AS FAR AS ALDRIDGE IS CONCERNED, IT'S TRUE THE FACTS -- IN FACT, I CITED ALDRIDGE REALLY FOR A DIFFERENT PROPOSITION WAS THAT THE PROPOSITION THAT SOMEBODY CAN AVOID A POLICE OFFICER WHICH YOU SEEM YOU'VE ALREADY RULED ON THAT.

THE COURT: THERE'S NO QUESTION IN MY MIND.

MS. BRICKLEY: THERE WASN'T A SITUATION WHERE THERE WAS A DROPPING OF SOMETHING IN ALDRIDGE, SO THEY NEVER REALLY ADDRESSED THAT QUESTION. SO, THE QUESTION IS WHETHER IN -- BASICALLY THE QUESTION IS WHETHER A THREAT OF AN ILLEGAL DETENTION, WHETHER IF SOMEBODY THROWS SOMETHING IN RESPONSE TO A THREAT OF AN ILLEGAL DETENTION,

WHETHER THAT EVIDENCE SHOULD BE SUPPRESSED AND I THINK THAT QUESTION HAS BEEN DIRECTLY ADDRESSED IN AT LEAST TWO CASES AND THOSE CASES WOULD BE MENIFEE FOR ONE, AND AGAIN YOU KNOW I WOULD HAVE TO AGREE WITH THE COURT THAT PATRICK JUST BASICALLY REACHED A DIFFERENT CONCLUSION THAN MENIFEE, BUT MENIFEE DIRECTLY ADDRESSED THAT QUESTION. IN FACT, I THINK IT PHRASES IT RIGHT IN THOSE WORDS AND SAID THAT IF THE DISCARDING IS IN RESPONSE TO A THREAT OF AN ILLEGAL DETENTION, THEN IT'S UNLAWFUL OR THE EVIDENCE SHOULD BE SUPPRESSED. AND, I BELIEVE WASHINGTON HOLDS THE SAME. I MEAN, IT DOES TALK WITH THE EGREGIOUSNESS OF THE CONDUCT BUT ITS BASIC HOLDING AND IT CITES MENIFEE ON PAGE 1125 AND PEOPLE VERSUS MENIFEE HELD THAT THE ACTION OF THE POLICE OFFICERS CONSTITUTE A THREAT OF AN UNLAWFUL DETENTION AND THEN IT GOES ON TO WHAT THEY CONCLUDED.

I THINK THAT'S EXACTLY WHAT HAPPENED IN WASHINGTON. THAT HAD TO BE WHAT THE COURT WAS HOLDING HERE EVEN IF THEY DIDN'T PUT IT IN THOSE EXACT WORDS, BECAUSE WHAT HAPPENED -- THEY FOUND AN ILLEGAL DETENTION AND THE DEFENDANT TOSSES THE STUFF WHILE RUNNING AWAY FROM THE OFFICERS, WHO WERE ABOUT TO ILLEGALLY DETAIN HIM. EXACT SAME SITUATION WE'RE DEALING WITH HERE. HAD THE POLICE STOPPED THIS PERSON AND SEARCHED HIM, IT WOULD HAVE BEEN UNLAWFUL. THE POLICE SHOULDN'T HAVE STOPPED AND SEARCHED HIM AND HAD THE POLICE COMPLIED WITH THE LAW, THEY NEVER WOULD HAVE FOUND THE STUFF. BUT THE COURT, NONETHELESS, GOES BACK TO THE FRUIT OF THE POISONOUS TREE TYPE RATIONAL -- YOU KNOW, THE OLD THEORY THAT IF THE OFFICERS DO SOMETHING THAT'S ILLEGAL OR IN THIS CASE ARE ABOUT TO DO, THEY'RE IN AN ACT OF DOING SOMETHING ILLEGALLY BY CHASING THESE KIDS IN AN ATTEMPT TO SEARCH THEM WHEN

THEY HAVEN'T DONE ANYTHING, OR ATTEMPT TO QUESTION THEM OR DETAIN THEM WHEN THEY HAVEN'T DONE ANYTHING, THEN ANYTHING THAT FLOWS FROM THAT, MUST BE SUPPRESSED. THAT'S THE TRUTH OF THE POISON.

THE COURT: LET ME COMMENT ON THAT BECAUSE THAT'S WHERE IT INTERFERES WITH MY VIEW OF GOOD REASONING THAT ANYTHING THAT FLOWS FROM THAT IS FRUIT OF THE POISONOUS TREE.

IF YOU COME UP TO MY FOUR-STORY APARTMENT, POINT YOUR GUN AT MY THREE YEAR OLD BABY AND SAY I'M ABOUT TO BLOW THIS BABY'S BRAINS OUT AND YOU STARTED PULLING THE TRIGGER AND IT HASN'T QUITE GONE OFF YET, AND I GRAB MY BABY AND THROW HER OVER THE BANISTER, HOPING LIKE HELL SHE'LL HIT ON A CANOPY OR SOMETHING OUTSIDE TO AVOID HAVING HER BRAINS BLOWN OUT, I THINK THAT IS A REAL AND UNNATURAL CONSEQUENCE OF WHAT YOU'VE JUST DONE. I MEAN, TRYING TO SAVE THE BABY, THAT IT'S AN ABSOLUTE NECESSARY THING FOR ME TO DO AND MERELY REASONABLE.

I DON'T SEE THROWING DOWN DOPE IN ORDER TO AVOID A COP FROM FINDING IT ON YOU AS BEING IN THE SAME CATEGORY AS THAT. NOW, WHAT I'M SAYING IS MAYBE NOT AS CLEARLY AS I OUGHT TO, THAT THERE ARE SOME THINGS THAT I THINK NATURALLY AND PROPERLY FLOW FROM CERTAIN KINDS OF ACTIONS. NOW, IT MAY NATURALLY BE THAT A MINOR WILL SAY I'M GOING TO THROW THIS STUFF BECAUSE I BELIEVE THAT IF THE COP COULDN'T CATCH ME WITH IT IN MY POCKET, THEN HE CAN'T PROVE THAT HE'S GUILTY. WE KNOW THAT IT'S FAIR TO REASON. WE DON'T SEE THAT AS CONSTITUTING NECESSARILY THE FRUIT OF THE POISONOUS TREE. THAT'S WHAT SOME PEOPLE DO AND WHAT SOME PEOPLE HAVE DONE IN MANY OF THESE CASES AND THAT'S WHAT'S HAPPENED AS YOU SAY IN MENIFEE

AND SOME OF THE OTHER CASES TOO AND THIS IS PART OF WHAT MAKES ME LEAN TOWARDS THE REASONING IN THE PATRICK CASE.

ANYHOW, IN THAT REGARD, HOW IS IT NECESSARILY THE FRUIT OF THE POISONOUS TREE JUST BECAUSE IT HAPPENED?

MS. BRICKLEY: WELL, I THINK WE'RE DEALING WITH A SITUATION WHERE YOU'RE ASSUMING THAT THE AVERAGE PERSON, ESPECIALLY AN AVERAGE JUVENILE, SORT OF KNOWS WHAT THE LAW IS. I THINK THAT IT'S PROBABLY FOR A LAY PERSON WOULD BE A COMMON ASSUMPTION THAT IF A POLICE OFFICER -- I MEAN IT'S THE SAME THING IF SOMEBODY IS ABOUT TO BE STOPPED FOR A TRAFFIC VIOLATION AND THEY HAVE DRUGS IN THEIR CAR, THEY'RE MOST LIKELY GOING TO HIDE THOSE DRUGS, EVEN THOUGH JUST STOPPING THIS PERSON FOR A TRAFFIC VIOLATION, THE COP CAN'T JUST GO SEARCHING THAT CAR.

THE COURT: NOT LEGALLY, WE KNOW THAT.

MS. BRICKLEY: YES, WE KNOW THAT. BUT, I THINK THE LAY PERSON DOES NOT KNOW THE LAW AND FROM WATCHING T.V. AND UNFORTUNATELY FROM REALITY OF WHAT HAPPENS SOMETIMES OUT ON THE STREETS, THAT THAT'S VERY LIKELY WHAT IS GOING TO HAPPEN IN RESPONSE TO THAT AND I THINK IT'S PROBABLY NOT AT ALL UNLIKELY THAT IF SOMEBODY IS STOPPED, ESPECIALLY WHEN AN OFFICER IS CHASING SOMEBODY, THAT THEY'RE GOING TO THINK IF HE CATCHES ME HE'S GOING TO LOOK IN MY POCKETS AND HE'S GOING TO FIND WHAT'S HERE, BECAUSE THAT IS WHAT THEY ARE ASSUMING. THEY DON'T THINK.

THE COURT: I DON'T QUARREL WITH YOU THAT THAT'S PROBABLY WHAT A LOT OF PEOPLE THINK. NOW, IS THAT THE

DETERMINING FACTOR THOUGH? IS THE COURT SUPPOSED TO SAY BECAUSE THAT'S THE WAY PEOPLE THINK, THEN WHAT THEY DO BASED UPON THAT THINKING, IS THE NATURAL FRUIT OF A POISONOUS TREE AND WHATEVER THEY DO OUGHT TO BE CONDONED? NO WAY, SUPPRESS IT?

MS. BRICKLEY: I THINK SO, BECAUSE THE STANDARD WHETHER THIS PERSON REACTED AND WHETHER EVEN A REASONABLE PERSON WOULD REACT TO THIS UNTHREAT OF AN UNLAWFUL DETENTION IN THAT MANNER.

THE COURT: WELL, OKAY. YOU'LL INTRODUCE SOMETHING ELSE WHETHER HE'S ACTING AS A REASONABLE PERSON WOULD. I ALWAYS LIKE TO THINK I'M REASONABLE. I KNOW I'VE HAD SPECIAL TRAINING OF THE LAW, YOU AND I ALSO KNOW THAT CERTAIN KINDS OF SEARCHES WOULD BE ILLEGAL. WHY DO YOU HAVE TO GO TO LAW SCHOOL IN ORDER TO DETERMINE THAT POLICEMEN DON'T HAVE THE RIGHT TO SEARCH YOU WITHOUT PROBABLE CAUSE OF SOME KIND OR THE OTHER?

MS. BRICKLEY: WELL, AGAIN, I THINK THAT IF AN OFFICER IS CHASING YOU, I THINK THAT PROBABLY ESPECIALLY IF YOU HAVE DOPE IN YOUR POCKET, YOUR ASSUMPTION IS THIS OFFICER IS CHASING YOU BECAUSE HE WANTS TO GO THROUGH YOUR POCKET AND -

THE COURT: LET HIM DO IT AND THEN I WILL GET ME A GOOD LAWYER FROM THE PUBLIC DEFENDER'S OFFICE AND THEY WILL SAY YOU'VE GOT IT MADE, SON, SO LONG AS THE COP DOESN'T COME UP AND LIE ABOUT WHAT HAPPENED, I'LL GET YOU OFF. SO, WHY NOT JUST LET THE COP CATCH YOU, GO THROUGH YOUR POCKETS AND START LAUGHING? SAY, I GOT YOU NOW YOU DUMB COP. YOU NEED BUSINESS DOING THIS. NOW MY LAWYER WILL GET ME OFF.

MS. BRICKLEY: I THINK THAT IS A VERY RATIONAL THOUGHT OUT REACTION, BUT I DON'T THINK THAT'S THE NATURAL REACTION IN A SITUATION LIKE THIS WHERE SOMEBODY IS CHASING AFTER YOU. I THINK THAT THE NATURAL REACTION IS TO DO EXACTLY WHAT'S BEEN TESTIFIED TO HAPPEN HERE, WHICH IS TO TRY TO --

THE COURT: LET'S TAKE IT TO A FURTHER EXTREME. SOME OF YOU GET SCARED WHEN FOLKS ARE CHASING US WITH GUNS ON THEIR PERSON. SUPPOSE THE KID TURNS AROUND AND BLOWS THE COP AWAY AND SAYS, LOOK IT MAN, I GOT SCARED THAT HE WAS GOING TO CATCH ME AND I THOUGHT HE WAS GOING TO HURT ME BECAUSE POLICEMEN DON'T LIKE PEOPLE RUNNING FROM THEM SO I TURNED AROUND, HE HAD A GUN, YOU DON'T KNOW WHAT HE WAS GOING TO DO WITH IT SO I SHOT HIM BETWEEN THE EYES.

DO YOU THINK THAT SHOULD BE CONDONED BY THE COURT BECAUSE THAT'S A NATURAL REACTION THAT SOME PEOPLE HAVE WHEN THEY'RE BEING CHASED WRONGFULLY?

MS. BRICKLEY: ALL I THINK WE'RE TALKING ABOUT TWO DIFFERENT SITUATIONS. WE'RE TALKING ABOUT SUPPRESSION AND THAT'S WHETHER SOMEBODY DID SOMETHING RIGHT OR WRONG.

THE COURT: YOU WANT TO SUPPRESS IT RIGHT OR WRONG, WHILE HE WAS BEING ILLEGALLY CHASED?

MS. BRICKLEY: NO, I DON'T THINK THAT IS THE SAME SITUATION BECAUSE I DON'T THINK THAT IS A NATURAL AND REASONABLE REACTION.

THE COURT: YOU NEVER GREW UP IN MY NEIGHBORHOOD. WE DON'T LIKE BEING CHASED BY FOLKS WITH GUNS.

MS. BRICKLEY: WELL, I JUST DON'T THINK THAT THAT'S AT THE SAME LEVEL. I DON'T THINK THAT IS AS NATURAL AND REASONABLE AS A SITUATION IN THIS SITUATION, WHO IS BEING CHASED BY A POLICE OFFICER WHO HAD DOPE IN THEIR POCKET AND I THINK THAT IS A VERY NATURAL REACTION. I SORT OF DON'T WANT TO GET HUNG UP ON THAT TOO MUCH, BUT I THINK REASONABLY REALLY THE ANSWER IS SIMPLY IN RESPONSE TO THE ILLEGAL DETENTION AND THAT'S WHERE --

THE COURT: THAT'S WHY I USED THAT RIDICULOUS EXAMPLE. IT WAS A RESPONSE TO A THREATENED ILLEGAL DETENTION.

NOW, IF YOUR POSITION IS SOME RESPONSES TO THREATENED ILLEGAL DETENTION, IT OUGHT TO BE SUPPRESSED. BUT, SOME RESPONSES OUGHT NOT BE SUPPRESSED. WHERE DO YOU DRAW THE LINE? WHERE SHOULD THE COURT DRAW THE LINE?

MS. BRICKLEY: WELL, YOU KNOW THAT'S A SITUATION WHERE I WOULD HAVE TO THINK OUT FURTHER. THAT, FORTUNATELY IS NOT BEFORE THE COURT RIGHT NOW.

THE COURT: YES, IT IS. IT'S NOT THE EXAMPLE, BUT THE ISSUE IS BEFORE THE COURT.

MS. BRICKLEY: RIGHT. I MEAN AS FAR AS THE GUN SITUATION AND LET ME SEE IN THE GUN SITUATION, YOU'RE SAYING THAT THE PERSON WHO IS CHASING HIM WAS A POLICE OFFICER BUT HE'S NOT DRESSED AS A POLICE OFFICER?

THE COURT: HE'S DRESSED LIKE A COP. LOOKS LIKE A COP.

MS. BRICKLEY: AND, HE'S CHASING WITH A GUN?

THE COURT: HE'S GOT HIS GUN. HE'S GOT HIS FULL UNIFORM ON.

MS. BRICKLEY: AND, THIS PERSON IS AFRAID HE'S GOING TO GET SHOT SO HE TURNS AROUND.

THE COURT: THE PERSON HAS SOME DOPE IN HIS POCKET, BUT HE ALSO KNOWS SOME OF THESE KIDS, IF YOU RUN FROM THESE POLICEMEN THEN THEY BEAT YOU UP AND HE SAYS I DON'T LIKE TO GET BEAT UP.

MS. BRICKLEY: THAT, I THINK, IS TOTALLY DIFFERENT. I DON'T THINK THAT IS A REASONABLE REACTION THAT A COP IS GOING TO SHOOT YOU OR BEAT YOU UP AND I DON'T THINK EVEN IF IT WAS TRUE THAT A COP IS GOING TO BEAT YOU UP, I DON'T THINK IT IS ALL REASONABLE TO SHOOT THAT PERSON BECAUSE YOU MAY BE GOING TO GET BEAT UP. I MEAN, WE'RE TALKING ABOUT TWO DIFFERENT THINGS ABOUT BEATING SOMEONE UP AND SHOOTING THEM. I DON'T THINK THAT IS AT ALL A REASONABLE REACTION TO THAT SITUATION.

THE COURT: ALL RIGHT. LET ME MAKE IT A CLEAN ONE THEN. HE REALLY THINKS THAT THE COP WILL SHOOT HIM. HE SAYS HE'S CHASING ME AND WE'VE GOT CRAZY COPS OUT THERE. THEY'VE GOT THESE GUNS AND NO JUDGMENT TO WHETHER YOU RUN AWAY FROM THEM SOME WILL SHOOT YOU AND THEY'LL COME INTO A COURT OF LAW AND SAY HE THREATENED ME IN SOME KIND OF WAY. THEY HAVE A THROW AWAY GUN. THEY SAID HE HAD THIS ON HIM SO I SAY I'M SCARED OF WHAT'S GOING TO HAPPEN, SO I SHOT HIM.

MS. BRICKLEY: I STILL DON'T THINK IT'S REASONABLE RESPONSES WHERE I DO THINK HERE IT WOULD BE A REASONABLE RESPONSE TO THINK THAT IF A POLICE OFFICER, YOU KNOW A DRUG AREA, YOU'VE GOT DRUGS IN YOUR POCKETS AND A POLICE OFFICER IS CHASING YOU. I THINK IT'S

NUMBER ONE, UNREASONABLE TO ASSUME HE'S CHASING YOU BECAUSE HE THINKS YOU HAVE DRUGS ON YOU AND NUMBER TWO, TO ASSUME HE'S CHASING YOU SO HE CAN FIND OUT IF YOU HAVE DRUGS ON YOU OR NOT.

THE COURT: YOU'VE BEEN UNDULY QUIET. WHAT'S ON YOUR MIND?

MS. KENFIELD: YOU'VE ALWAYS TOLD ME NOT TO INTERRUPT. I DID A LITTLE BIT OF RESEARCH AND I CAME UP WITH ONE ADDITIONAL CASE THAT THE COURT SAYS -- WELL, LET ME GIVE IT TO YOU, THAT'S THE HOLLOWAY CASE AT 176; CAL.APP.3D; 150. IT TALKS ABOUT MENIFEE AND IT TALKS ABOUT PATRICK AND THE FACTS IN THIS CASE IN LIGHT OF THE COURT'S RULING THAT THE CHASE WAS ILLEGAL, BASICALLY A POLICE OFFICER WALKS UP, SOMEBODY TURNS AROUND AND LOOKS SURPRISED, THE OFFICER WHO HAD BEEN LOOKING DOWN AT HIS OPEN HAND, CLOSED HIS FIST AND MOVED HIS ARM -- YOU KNOW, AS IF HE WAS GOING TO THROW SOMETHING, AT WHICH POINT THE OFFICER GRABBED IT AND OPENED HIS HAND AND THE COURT THERE DISTINGUISHED BETWEEN ILLEGAL DETENTION AND A THREATENED ILLEGAL SEARCH. I THINK THE FACT THAT THERE WAS A POSSIBLE ILLEGAL DETENTION DOES NOT NECESSARILY MEAN THERE'S GOING TO BE A THREATENED ILLEGAL SEARCH. AND, IF THERE IS A CAUSAL CONNECTION, THE COURT STATES THAT THE CHALLENGING PARTY MUST DEMONSTRATE AN EXPLOITIVENESS BETWEEN THE CHALLENGED EVIDENCE AND THE PRIMARY ILLEGALITY.

THE COURT: I'M SORRY, READ THAT AGAIN?

MS. KENFIELD: THE CHALLENGING PARTY MUST DEMONSTRATE AN EXPLOITIVENESS BETWEEN THE CHALLENGED EVIDENCE AND THE PRIMARY ILLEGALITY.

THE COURT: WHAT DO THEY MEAN BY THAT?

MS. KENFIELD: I THINK WHAT THEY MEAN IS THAT THE PERSON WHO'S CHALLENGING THE EVIDENCE, MUST SHOW THAT THERE'S SOME REASON TO SAY BECAUSE I WAS GOING TO BE ILLEGALLY DETAINED, BECAUSE I THOUGHT I WAS GOING TO BE ILLEGALLY DETAINED OR I WAS ILLEGALLY DETAINED THAT THERE WOULD BE THROUGH SOME BREAKING INEVITABILITY OF AN ILLEGAL SEARCH. AND, THE COURT GOES ON TO TALK ABOUT, IT IS ONLY WHEN A PERSON HAS REASONABLE CAUSE TO BELIEVE THAT HIS PRIVATE POSSESSIONS WILL INEVITABILITY BE EXPOSED TO VIEW BY IMPROPER POLICE PRACTICE THAT THEIR ATTEMPTED ABANDONMENT WOULD BE DEEMED THE FRUIT OF THAT CONVENT.

SO YOU WOULD, WHAT THE COURT IN HOLLOWAY SEEMS TO SAY THAT YOU HAVE TO DEMONSTRATE THAT THERE IS -- THAT THE PERSON HAS REASONABLE CAUSE TO BELIEVE THAT THERE IS SOME INEVITABILITY ABOUT A DETENTION AND THEN INEVITABILITY A SEARCH AND THAT THE EVIDENCE WILL BE SUPPRESSED. AND, THE COURT COMMENTS THAT THE HOLLOWAY CASE, THE INDIVIDUALS OWN AWARENESS OF THE ELICIT NATURE OF THE ACTIVITY THAT PROMPTED HIS EFFORTS TO DESTROY THE FRUITS OR DESTROY THE PROOF. THAT HE KNEW HE HAD SOMETHING ILLEGAL AND HE WANTED TO GET RID OF IT.

THERE WAS NO THREAT OF AN ILLEGAL SEARCH JUST BECAUSE THERE WAS THREAT OF AN ILLEGAL DETENTION. AND, I THINK WASHINGTON ALSO IS NOT INCONSISTENT WITH THAT BECAUSE IF I RECALL IN WASHINGTON, THERE WAS A CHASE OF SOME FOUR OR FIVE BLOCKS.

THE COURT: I THINK IT WAS ABOUT TWO MINUTES.

MS. KENFIELD: AND, WHAT WE HAVE HERE, IS THE POLICE OFFICER GET AROUND AND RUN TO CUT OFF THE ESCAPE AND THIS MINOR IS LOOKING BEHIND HIM, HE DOESN'T SEE ANYTHING AND THEN HE LOOKS UP AND SEES THE POLICE. I DON'T THINK THAT IS A SITUATION WHERE IN WASHINGTON THE COURT SEEMED TO BE CONSISTENT WITH HOLLOWAY, WHEREIN THIS TWO MINUTE EXTENDED CHASE OVER A GREAT PERIOD OF TIME WOULD GIVE SOMEBODY AN INEVITABLE REASON.

THE COURT: ALL RIGHT. AND, THEY USED THIS WORD INEVITABILITY QUOTE, "OF AN ILLEGAL SEARCH," IS THAT THE PHRASE THAT'S USED IN HOLLOWAY?

MS. KENFIELD: YES, ON PAGE 156.

THE COURT: NOW, YOU THEN, I GATHER YOUR ARGUMENT IS THAT THERE HAS TO BE AN INEVITABILITY OF AN ILLEGAL SEARCH VERSUS MS. BRICKLEY'S ARGUMENT WHICH IS THAT SIMPLY IF THE REACTION TO THE ILLEGAL CHASE IS A REASONABLE REACTION, YOU SAY NO, ITS GOT TO BE MORE THAN THAT. ITS GOT TO SHOW THAT INEVITABILITY THAT WOULD FOLLOW AN ILLEGAL SEARCH.

MS. KENFIELD: THERE HAS TO BE SOME EVIDENCE OR SOME FACTS WHEREBY THE INDIVIDUAL COULD REASONABLY SAY THAT A SEARCH INEVITABLE RATHER THAN JUST A, HI, HOW ARE YOU, WHAT ARE YOU DOING OUT HERE AT 10:00 O'CLOCK AT NIGHT -- BECAUSE THERE ARE DETENTIONS WITHOUT SEARCHES. THERE ARE FIELD CONTACTS. THERE ARE A NUMBER OF THINGS. THESE OFFICERS DIDN'T SAY THEY WANTED TO SEARCH THESE INDIVIDUALS. THEY WANTED TO FIND OUT WHO THEY WERE AND WHAT THEY WERE DOING BECAUSE THEY THOUGHT THEY WERE INVOLVED IN DOPE.

THE COURT: ACTUALLY, MY LOGIC REJECTS THE RULES OF OTHERS THAT INSIST I HAVE TO FOLLOW, BUT MY LOGIC REJECTS EVEN THAT ARGUMENT BECAUSE I SEE AN INTERVENING ACT, NAMELY THE DISCARDING OF THE CONTRABAND BY SOMEBODY. I DON'T SEE, EVEN IF IT'S INEVITABLE IF THERE WAS AN ILLEGAL SEARCH, I SEE ABSOLUTELY NO REASON WHY SOMEBODY HAS TO DISCARD THE CONTRABAND. JUST KEEP IT AND THEN LET THEM GO ON AND SEARCH ILLEGALLY AND THEN GO THROUGH THE SAME ARGUMENT THAT I WENT THROUGH BEFORE, THAT I SEE AS AN INTERVENING ACT ON THE PART OF THE PERSON. WOULD THE COURTS DEAL WITH THAT IN ANY OF THE CASES?

MS. BRICKLEY: WELL, I JUST WAS LOOKING AT PEOPLE VERSUS WASHINGTON ON PAGE 1126 AND UNDER ROMAN NUMERAL THREE, THERE'S A WHOLE DICUSSION OF REALLY THAT ISSUE. THE TRUTH OF THE POISONOUS TREE AND THEY CITE STANDARDS THAT IS WHETHER GRANTING ESTABLISHMENT OF THE PRIMARY ILLEGALITY, THE EVIDENCE TO WHICH, IN FACT, AN OBJECTION IS MADE HAS BEEN COME AT BY EXPLOITATION OF THAT ILLEGALITY OR INSTEAD BY MEANS SUFFICIENTLY DISTINGUISHABLE TO BE OF THE PRIMARY ILLEGALITY. AND, THEN THEY DISCUSS --

THE COURT: LET'S NOT GO BEYOND THAT. LET'S DEAL WITH THAT PHRASE, EXPLOITATION OF THAT ILLEGALITY.

NOW, I HAVE TO ASSUME OR I DO ASSUME, THAT THEY MEAN THE EXPLOITATION BY THE POLICE OF THAT OF THEIR OWN ILLEGALITY.

MS. BRICKLEY: ACTUALLY, I DON'T -- I'M NOT REALLY SURE.

THE COURT: IT WOULDN'T MAKE ANY SENSE OTHERWISE. IT APPEARS TO ME --

MS. BRICKLEY: BUT, I THINK YOU HAVE TO LOOK THAT IN THE DISCUSSION AND TIE IT IN WITH THE FACT OF THIS CASE WHICH MEANS THE HE RUNS AND STASHES THE STUFF AS THE POLICE OFFICER IS CHASING HIM AND THERE THEY FIND THAT THAT DOES FALL WITHIN THAT STANDARD.

THE COURT: BUT, THE ACT WHICH YOU OBJECT TO, WHICH FLOWS FROM THE ILLEGALITY IS THE DISPOSAL -- THE DISCARDING OF THE CONTRABAND.

NOW, THE COPS DIDN'T DISCARD THE CONTRABAND, SO HOW CAN IT BE SAID THAT THE COPS EXPLOITED THEIR OWN ILLEGALITY AND OF COURSE, YOU DON'T CALL IT EXPLOITING IF THE MINOR THROWS IT AWAY.

MS. BRICKLEY: I THINK WHAT THAT MEANS IS BASICALLY WHETHER IT WAS THE RULE OF THAT ILLEGALITY OR WHETHER SOMETHING THERE WAS SOMETHING THAT INTERVENES OR BECAME MADE SUFFICIENTLY IN TIME OR WHATEVER WAY SEPARATE FROM THAT. AND, THEN THEY GO ON TO SAY YOU KNOW, UPON THE FACTORS OF THE FACTS BEFORE US WHICH CANNOT SAY ABANDON. TWO MINUTES HE LAPSED HERE IT WAS LESS BETWEEN SEIZURE AND ABANDONMENT AND THEY CONSIDER SEIZURE AND THEY DISCUSSED THAT BEFORE AS BEING THE CHASING THAT THEY CONSIDER A SEIZURE. THERE WERE NO INTERVENING CIRCUMSTANCES AND IN DEED, BECAUSE THE DEFENDANT DISCARDED THE BINDLE DURING THE CHASE THE ABANDONMENT OCCURRED WHILE HE WAS ILLEGALLY SEIZED AND THIS WOULD BE INTERVENING CIRCUMSTANCES, SO I THINK THAT'S IDENTICAL TO THE SITUATION.

ANOTHER THOUGHT THAT CAME TO MIND IS ANOTHER SITUATION WHICH WE CALL, SEEM TO HAVE ACCEPTED I THINK IS SOMEWHAT SIMILAR YOU KNOW, IT'S ANOTHER FRUIT SITUATION. I MEAN, WE'VE ALL HEARD CASES -- LET'S TAKE AN EXAMPLE OF A CAR STOPPED AND LET'S ASSUME ITS

STOPPED ILLEGALLY. THERE'S REALLY NO JUSTIFICATION FOR STOPPING THIS CAR AND AS THE OFFICERS ARE WALKING ABOUT THERE ARE SOME FURTIVE MOMENTS AND BECAUSE OF THE FURTIVE MOMENTS AND THEN MAYBE THE PERSON DOES SOMETHING IN ADDITION TO SCARE THE OFFICER, THEN THE OFFICER GOES IN AND SEARCHES THE CAR AND FINDS HIM WITH CONTRABAND. I THINK THAT, YOU KNOW, IF IT HAD NOT BEEN ILLEGAL DETENTION, THE FURTIVE MOMENTS AND IF THE INDIVIDUAL IN THE CAR DOES SOMETHING THAT WOULD MAYBE MAKE THE OFFICER FEEL HE'S IN DANGER, THERE'S NO QUESTION THAT THOSE FACTS HAVE NOT BEEN FOR ILLEGAL DETENTION WOULD JUSTIFY GOING IN AND SEARCHING THAT CAR. BUT, ONCE THE COURT RULES THAT THERE WAS NO REASON TO STOP THAT CAR, WE HAVE ALL ACCEPTED AND IT IS THE LAW THAT WHAT FOLLOWED FROM THERE, IS THE FRUIT OF THAT ILLEGAL DETENTION.

THE COURT: I'M NOT SURE THAT THE CASES THAT I SAY I READ SAY AS A MATTER OF FACT PARTICULARLY WASHINGTON, CLEARLY DOESN'T SAY THAT ANYTHING THAT FOLLOWS FROM AN ILLEGAL DETENTION IS NECESSARILY SUPPRESSIBLE. AS A MATTER OF FACT, THEY SPECIFICALLY SAY IT'S NOT SOMEWHERE IN HERE -- OF COURSE WE GET BACK TO THAT EARLIER QUESTION WHERE I RAISED THE QUESTION INSTEAD OF THROWING AWAY SOME DOPE AND KILLING THE COP BETWEEN THE EYES, WE'RE TALKING ABOUT RELATIONS OF REACTIONS TOTAL ILLEGALITY AND I THINK IT'S ON PAGE 1128 HERE SOMEWHERE. IT'S ON PAGE 1127. IN TALKING ABOUT -- I'M QUOTING FROM THE LAST THAT THE COURT IN WASHINGTON SAYS THAT THE EXCLUSIONARY RULE IS INEVITABLY INTERPRETED TO PROSCRIBE THE USE OF AN ILLEGALLY SEIZED EVIDENCE IN ALL PROCEEDINGS, AND THEY GO ON TO SAY THAT IT IS NEITHER INTENDED NOR ABLE TO CURE THE INVASION OF THE DEFENDANT'S RIGHTS WHICH HE HAS ALREADY SUFFERED.

SO, HE HAS ALREADY BEEN DETAINED. HE CITES UNITED STATES AGAINST LEON FOR THAT. THEN THEY GO ON TO SAY -- RATHER THE RULE OPERATES AS A JUDICIALLY RELATED REMEDY DESIGNED TO SAFEGUARD THE FOURTH AMENDMENT RIGHTS GENERALLY THROUGH ITS DETERRENT EFFECT, RATHER THAN A PERSONAL CONSTITUTIONAL RIGHT OF THE PARTY APPROACHED.

I THINK THEY'RE MAKING IT VERY CLEAR THAT IT DOESN'T RETUNE THAT IF THERE IS AN ILLEGAL CHASE, AS IN THIS CASE, THAT ALL EVIDENCE THAT RESULTS FROM THAT HAS TO BE SUPPRESSED.

MS. BRICKLEY: MY UNDERSTANDING OF THAT WOULD BE, I THINK THEY'RE REFERRING IN ALL PROCEEDINGS. THAT DOESN'T APPLY, FOR EXAMPLE, ALL CIVIL PROCEEDINGS TOO. MY UNDERSTANDING IS THE POINT THEY'RE MAKING IS THE PURPOSE OF IT IS TO DETER IMPROPER POLICE CONDUCT, NOT TO GIVE A REMEDY.

THE PURPOSE IS NOT TO LET PEOPLE OUT, MAYBE THEY'VE DONE SOMETHING WRONG. THE PURPOSE IS TO DETER UNLAWFUL POLICE CONDUCT AND I AGREE WITH THAT AND I THINK THAT'S ALL THE MORE REASON WHY IN THIS TYPE OF SITUATION WHERE YOU KNOW EVERYBODY OR YOUR HONOR, AT LEAST THERE HAS BEEN ILLEGAL POLICE CONDUCT AND THAT THE EVIDENCE SHOULD BE SUPPRESSED.

IF THAT'S THE REASON FOR IT AND I THINK THAT'S THE REASON AND IF THIS IS ALL ABOUT DETERRING UNLAWFUL POLICE CONDUCT, IF IT'S BEEN ONCE, IT'S BEEN ESTABLISHED, IF WE'RE GOING TO DEFER IT THEN THE REMEDY IS TO SUPPRESS THE EVIDENCE.

THE COURT: THEN WHAT ABOUT PAGE 1127, BROWN AGAINST ILLINOIS? ANOTHER UNITED STATES SUPREME COURT

CASE AS TO WHETHER THE DISCARDING OF THE CONTRABAND WAS THE PRODUCT OF A FREE WILL. WHY EVEN GET INVOLVED IN THAT IF WE FOLLOW YOUR REASONING THAT ANY TIME THERE'S AN ILLEGAL CHASE AND SOMEBODY THROWS SOMETHING DOWN IN ORDER NOT TO GET CAUGHT WITH IT AND IT AUTOMATICALLY SHOULD BE SUPPRESSED? HERE THEY'RE SAYING THAT NO SINGLE FACT IS DISPOSITIVE(SIC) TO WHETHER OR NOT THIS IS AN ACT OF FREE WILL OR NOT AND THE COURT PROCEEDED TO SEVERAL FACTORS NOW FOR DETERMINING A CONTINUATION OF A FACT TO AN ILLEGAL CONDUCT AND THEY CITE THREE THINGS THAT YOU LOOK FOR.

IF I FOLLOW YOUR REASON, YOU DON'T HAVE TO LOOK FOR ANYTHING EXCEPT WHERE A COP IS WRONG AND IS CHASING HIM AND HE THROWS IT DOWN BECAUSE HE WAS SCARED HE WAS GOING TO GET CAUGHT WITH IT SO I SHOULD SUPPRESS IT.

MS. BRICKLEY: BUT THE FACT OF THE MATTER IN THIS CASE WHERE WE HAVE A SITUATION IDENTICAL HERE WHERE AN OFFICER IS CHASING SOMEBODY, UNLAWFULLY CHASING SOMEBODY, AND HE THROWS THE OBJECT DOWN AND THE COURT DID SUPPRESS IT.

THE COURT: YES. WE'RE GOING IN CIRCLES NOW.

MS. BRICKLEY: IF THE COURT IS CONCERNED OF THAT, I KNOW AS I MENTION I RECENTLY GOT A MEMO AND THERE ARE A NUMBER OF FEDERAL AND OUT OF STATE CASES WHICH HAVE SPECIFICALLY ADDRESSED THIS ISSUE AND HAVE FOLLOWED THE MENIFEE RATIONAL. IF THE COURT WANTS IT, I WOULD BE HAPPY TO DO A LITTLE MORE RESEARCH WITH THE EXCEPTION OF THAT PATRICK CASE. THE CASES HAVE CONSISTENTLY HELD THAT WHERE THERE IS A THREAT OF AN ILLEGAL DETENTION AND THE THROWING IS IN RESPONSE TO THAT, THE EVIDENCE SHOULD

BE SUPPRESSED. AND, I WOULD BE HAPPY TO DO SOME MORE RESEARCH ON IT.

THE COURT: I WOULD WELCOME POINTS AND AUTHORITIES. LET ME MAKE SURE YOU UNDERSTAND MY PRINCIPAL CONCERN. I'M NOT CONCERNED WITH THE ILLEGALITY OF THE CHASE ON THESE FACTS. I THINK THIS WAS CLEARLY ILLEGAL. THE COPS HAD NO REASONABLE BASIS FOR DOING WHAT THEY DID IN CHASING HIM.

MY CONCERN IS, AM I REQUIRED TO MAKE A FINDING THAT BECAUSE THE POLICE ACTED ILLEGALLY IN CHASING, AM I REQUIRED TO FIND THAT ANYTHING THAT WAS DISPOSED OF WHEN I BELIEVE IT WAS DISPOSED OF BY THE PERSON TO PREVENT THE OFFICER FROM FINDING IT ON HIS PERSON, AM I REQUIRED TO DETERMINE THAT THAT'S SUPPRESSIBLE?

MS. BRICKLEY: OKAY.

THE COURT: ALSO, WHAT I WANT YOU TO SEE IF YOU CAN FIND IF THERE ARE SOME CASES THAT DEALT WITH HAVING A REASON HUNG UP WITH THESE CASES EVEN THE ONES THAT FIND THAT IT SHOULD BE SUPPRESSED. I DON'T FIND THAT THEY CLEARLY STATE WHAT I AM TO LOOK FOR IN ORDER FOR ME TO FIND THAT THE MINOR WAS GOING TO BE SEARCHED. I'LL GO EVEN FURTHER THAN THAT.

I DON'T UNDERSTAND THAT REASONING THAT SAYS EVEN IF YOU KNOW A HUNDRED PERCENT THIS COP IS GOING TO SEARCH ME ILLEGALLY, HOW DOES THAT JUSTIFY YOU IN DISCARDING CONTRABAND AND THEN GETTING THE BENEFIT OF HAVING THAT SUPPRESSED. I DON'T UNDERSTAND THE REASONING THAT SAYS THAT. WHERE AS, IF YOU DON'T DISCARD IT AND THE POLICE FIND IT AS A RESULT OF AN ILLEGAL SEARCH, IT WILL AUTOMATICALLY BE SUPPRESSED. JUST LOGIC TELL ME THERE'S NO JUSTIFICATION FOR SAYING IF YOU

THROW IT AWAY JUST BEFORE THE COP GETS TO YOU WHEN HE'S CHASING YOU, IT WILL BE SUPPRESSED. IT SHOULD BE SUPPRESSED. IF YOU LEAVE IT IN YOUR POCKET AND HE SEARCHED YOU ILLEGALLY, IT'S GUARANTEED TO BE SUPPRESSED. NO QUESTION ABOUT IT.

THOSE ARE THE PRINCIPAL ISSUES I AM CONCERNED WITH AND ANYTHING THAT YOU TWO HAVE THAT YOU COULD FIND ON THAT, I WOULD BE GRATEFUL. I AM INCLINED AT THIS STAGE TO DENY YOUR MOTION. I GUESS IT'S COME THROUGH BY NOW.

MS. BRICKLEY: RIGHT.

THE COURT: SO HOW MUCH TIME DO YOU NEED? IS HE IN OR OUT?

MS. BRICKLEY: HE'S IN, SO I'M GOING TO HAVE TO TALK TO HIM ABOUT IT.

THE COURT: HOW MUCH TIME DO YOU NEED TO SUBMIT POINTS AND AUTHORITIES?

MS. BRICKLEY: HODARI WOULD PREFER -- I WOULD LIKE A WEEK ANYWAY AND HE WOULD PREFER THAT HE COULD BE RELEASED FROM CUSTODY. I FIRST WOULD LIKE TO ASK THE COURT IF YOU WOULD CONSIDER DOING THAT SO THAT I COULD HAVE SOME MORE TIME TO RESEARCH THIS. HIS MOTHER IS HERE. IT WAS MY UNDERSTANDING HE WAS ON PROBATION WHEN THIS OCCURRED. HOWEVER, I BELIEVE UP TO THIS TIME, HE HAD BEEN DOING WELL AND THAT HE -- HIS MOTHER SAID HE HAD BEEN GOING TO SCHOOL REGULARLY AND HE HAS BEEN IN CUSTODY NOW SINCE THIS INCIDENT OCCURRED.

THE COURT: I GATHER HE'S IN CUSTODY PURSUANT TO THE RECOMMENDATION OF THE PROBATION

DEPARTMENT AND CERTAINLY THE DECISION OF THE REFEREE.

MS. KENFIELD: YES.

THE COURT: I WOULD NOT BE INCLINED TO CHANGE THAT.

MS. BRICKLEY: WELL, I THINK IN THAT CASE, YOU'LL WAIVE TIME FOR A WEEK?

THE DEFENDANT: YES.

MS. BRICKLEY: OKAY.

THE COURT: TIME AND IRREGULARITIES ARE WAIVED, IS THAT CORRECT?

MS. BRICKLEY: YES.

THE COURT: THIS MATTER WILL THEN GO OVER ONE WEEK FOR FURTHER HEARING.

THE CLERK: MAY 19 AT 1:45 P.M.

THE COURT: IS THAT SATISFACTORY TO BOTH PARTIES?

MS. DULAN: I ASSUME THAT I'M SUPPOSED TO BE HERE? I HAVE JURY DUTY NEXT WEEK. I'M SUPPOSED TO BE CALLED ON THE 16TH AND I'M SUPPOSED TO BE AVAILABLE FOR TEN DAYS AT SUPERIOR COURT. I CAN SEE IF HIS FATHER IS GOING TO BE HERE.

THE COURT: WELL, IF EITHER PARENT IS HERE, THAT WOULD FINE.

MS. DULAN: I CAN'T SAY WITHOUT GETTING BACK HOME AND TALKING TO HIM. I IMAGINE HE COULD TAKE OFF FROM WORK BUT HE COULDN'T TODAY, SO I DON'T KNOW.

THE COURT: WOULD YOU RATHER GO TO JURY DUTY OR WOULD YOU RATHER BE HERE IF YOU HAD YOUR CHOICE?

MS. DULAN: I WOULD RATHER BE HERE.

THE COURT: ALL RIGHT. LET'S SEE IF WE CAN'T MAKE THAT EASIER FOR YOU. I'M ORDERING YOU TO RETURN HERE ON MAY 19 AT 1:45 P.M. THE CLERK WILL GIVE YOU WHATEVER YOU NEED TO BE GIVEN TO THE JURY COMMISSIONER AND THEY'LL UNDERSTAND YOU DON'T HAVE ANY CHOICE, YOU'VE GOT TO FOLLOW THE ORDERS OF THE JUDGE.

MS. DULAN: YES, THANK YOU.

THE COURT: IF THEY GIVE YOU ANY LIP ABOUT IT, CALL MY CLERK.

ALL RIGHT. MAY 19 AT 1:45 FOR FURTHER HEARING.

THURSDAY, MAY 19, 1988 1:45 P.M.

THE COURT OFFICER: THIS IS THE MATTER OF HODARI DULAN.

HODARI IS PRESENT, REPRESENTED BY MISS JANICE BRICKLEY OF THE PUBLIC DEFENDER'S OFFICE.

WITH HODARI, ARE YOU HIS MOTHER, MRS. PAULETTE ROBINSON?

THE MINOR'S MOTHER: YES.

THE COURT OFFICER: THANK YOU.

REPRESENTING THE DISTRICT ATTORNEY'S OFFICE IS MISS ANN KENFIELD.

THE MINOR'S MATTER IS ON THE CALENDAR FOR FURTHER HEARING, DECISION ON POINTS AND AUTHORITIES.

THE COURT: LET'S REOPEN IT FOR SOME DISCUSSION. I STILL HAVE THE SAME DIFFICULTIES I HAD BEFORE.

I WANT TO COMMEND BOTH PARTIES FOR SUBMITTING THEIR POINTS AND AUTHORITIES. I FIND THAT THE PUBLIC DEFENDER HAS SUBMITTED AN EXHAUSTIVE LIST OF POINTS AND AUTHORITIES WHICH CLEARLY ESTABLISH THAT MOST OF THE COURTS OF THE COUNTRY TEND TO FOLLOW THE RULE OF A THREATENED ILLEGAL SEARCH AS JUSTIFYING SUPPRESSION OF ANY EVIDENCE THAT IS DISCARDED AS A RESULT THEREOF. MANY OF THOSE CASES THAT ARE CITED, HOWEVER, ARE ONLY OF PERSUASIVE WEIGHT RATHER THAN WHAT I BELIEVE THAT THIS COURT IS OBLIGED TO FOLLOW.

CASES FROM OTHER STATES, CASES OF FEDERAL CASES OF LESS THAN THE UNITED STATES SUPREME COURT I FIND PERSUASIVE BUT THAT'S ALL.

LET ME ASK ONE OTHER QUESTION BECAUSE MAYBE YOU WANT TO RESPOND TO THIS, MISS KENFIELD. I DON'T FIND ANY FEDERAL CASES IN YOUR DOCUMENTS. MY RECOLLECTION IS THAT LANCE M. DECIDED THAT THE RULES ON SUPPRESSION, THE CALIFORNIA RULES ON SUPPRESSION, CALIFORNIA NO LONGER HAS A SEPARATE SET OF RULES ON SUPPRESSION FROM THE FEDERAL BUT THAT WE ARE NOW BOUND BY, AS FAR AS SEARCHES ARE CONCERNED, WE ARE NOW BOUND BY THE RULES AS THEY'RE APPLIED BY THE UNITED STATES SUPREME COURT.

DO YOU DISAGREE WITH THAT OR IS THAT YOUR RECOLLECTION OF THAT?

MS. KENFIELD: THAT IS, YES. I AGREE WITH THAT.

THE COURT: ALL RIGHT. NOW, THERE ARE SOME CASES CITED BY THE DEFENSE OF THE UNITED STATES SUPREME

COURT WHICH SEEM TO SUSTAIN HER POSITION -- I DON'T SEE ANY CITED IN YOUR MEMO UNLESS I FLAT OUT MISSED IT -- BY THE U.S. SUPREME COURT THAT SEEMED TO SUSTAIN THE PATRICK LINE OF CASES. DO YOU HAVE SOME OR DID I JUST MISS SOME OR DID YOU HAVE SOME THAT YOU DIDN'T PUT IN OR WHAT IS YOUR COMMENT?

MS. KENFIELD: I DID NOT HAVE ANY UNITED STATES SUPREME COURT CASES DIRECTLY ON POINT BECAUSE IT'S MY UNDERSTANDING THAT THERE ARE NONE. THERE IS CURRENTLY A THREATENED DETENTION CASE, AN ABANDONMENT CASE BEFORE THE UNITED STATES SUPREME COURT, BUT IT HAS NOT BEEN DECIDED.

IN LOOKING AT -- I HAVE NOT HAD A CHANCE SINCE I WAS OUT OF THE OFFICE YESTERDAY DUE TO -- AND THIS MORNING DUE TO ILLNESS, TO READ ALL OF THE CASES CITED BY DEFENSE COUNSEL, PARTICULARLY THE FACTUAL BASIS FOR WHICH THEY WERE, BUT I DID NOT CITE ANY FEDERAL -- ANY UNITED STATES SUPREME COURT CASES OTHER THAN AS THEY WERE, AS THEY HAVE BEEN CITED AND APPLIED BY THE UNITED STATES SUPREME COURT --

THE COURT: ALL RIGHT. NOW, LET ME SEE.

MS. KENFIELD: -- OR BY THE CALIFORNIA COURTS.

THE COURT: LET ME SEE IF I OVERSTATED CITES IN THE DEFENSE MEMO. AND I NOTICE ON PAGE EIGHT OF HER MEMO SHE CITES A MISSOURI CASE WHICH I WILL NOT DEEM AS BINDING BUT THE REFERENCE TO IT IS THAT THAT COURT RELIED UPON WONG SUN AGAINST THE UNITED STATES WHICH IS A U.S. SUPREME COURT CASE.

I AM NOT FAMILIAR WITH WONG SUN. ARE YOU?

MS. KENFIELD: YES, YOUR HONOR. I'M NOT FAMILIAR WITH THE FACTS IN WONG SUN BUT WONG SUN IS CITED IN JUST ABOUT ALL OF THE CASES THAT I CITED. IT'S THE CASE THAT ESTABLISHED THE DOCTRINE OF FRUIT OF THE POISONOUS TREE. PATRICK CITES WONG SUN; ROBERT D. CITES WONG SUN; MENIFEE CITES WONG SUN; WASHINGTON CITES WONG SUN; HOLLOWAY CITES WONG SUN.

THE COURT: THE PRINCIPLE OF FRUIT OF THE POISONOUS TREE I'M THOROUGHLY FAMILIAR WITH. YOUR POSITION IS THAT WONG SUN IS RELEVANT ONLY ON THAT ISSUE; IT'S NOT RELEVANT TO THE ISSUE OF WHETHER OR NOT A THREATENED ILLEGAL DETENTION JUSTIFIES A SUPPRESSION OF ABANDONED CONTRABAND?

MS. KENFIELD: MY MEMORY OF WONG SUN IS THAT IT INVOLVED A -- SOMETHING FAR MORE THAN A THREATENED ILLEGAL DETENTION.

THE COURT: YOUR RECOLLECTION?

MS. BRICKLEY: TO TELL THE TRUTH I DON'T REALLY REMEMBER THE FACTS OF WONG SUN. I SHOULD HAVE LOOKED THAT UP. THAT IS SORT OF -- WHEN WE WERE IN LAW SCHOOL THAT WAS THE STANDARD CASE; THAT WAS THE FIRST CASE THAT DEVELOPED THIS FRUIT OF THE POISONOUS TREE DOCTRINE. I DON'T BELIEVE IT WAS AN EXACT SIMILAR SITUATION TO THIS, ALTHOUGH REID VS. GEORGIA, WHICH IS ANOTHER U.S. SUPREME COURT CASE, WAS ALMOST AN IDENTICAL SITUATION TO THE ONE WE HAVE BEFORE US.

THE COURT: WHERE DO YOU HAVE THAT CITED?

MS. BRICKLEY: RIGHT AT THE BEGINNING, THE FIRST PAGE OF MY BRIEF,

AND I JUST READ THAT LAST WEEK AND IT'S VERY CLOSE.

THE COURT: DO YOU RECALL THE FACTS IN REID?

MS. BRICKLEY: YES. IT WAS AT THE AIRPORT. EXACTLY AS IT SAID, THEY APPROACHED HIM BECAUSE THEY THOUGHT HE MET THE DRUG PROFILE AND THEY ASKED HIM TO COME OVER, AND HE RAN AND HE DROPPED SOMETHING.

THE COURT: THE OLD DRUG PROFILE CASE ALL RIGHT.

MS. BRICKLEY: HE RAN AND HE DROPPED SOMETHING, AND THE COURT HELD THAT IT HAD TO BE SUPPRESSED, AGAIN CITING WONG SUN.

THE COURT: THAT'S NOT ONE OF THOSE CASES THAT YOU COPIED AND GAVE TO ME, IS IT?

MS. BRICKLEY: IT'S NOT. I DON'T KNOW WHY I DIDN'T. I GUESS I WAS THINKING YOU HAD THAT.

THE COURT: I HAVE NO FEDERAL CASES AT ALL.

MS. BRICKLEY: I THOUGHT YOU HAD THE U.S. I CITE -- I DID XEROX THE TWO FEDERAL CASES. WE DON'T HAVE THAT EITHER, UNFORTUNATELY. NONE OF THE --

THE COURT: I HAVE TO GO TO ONE OF THE TWO LIBRARIES, EITHER IN THE OAKLAND MUNI COURT OR THE COURT HOUSE.

MS. BRICKLEY: IF YOU'RE VERY INTERESTED WE COULD PASS THIS AND I COULD RUN OVER. WHERE I READ IT IS THE ONE AT THE OAKLAND MUNI LIBRARY.

THE COURT: I APPRECIATE THE DOCTRINE OF STARE DECISIS AND I KNOW WHEN I'VE GOT TO FOLLOW THE DICTATES OF THE COURTS THAT ARE SUPERIOR TO MINE. MY GUT DISAGREES WITH THIS REASONING BUT MY GUT DOESN'T HAVE ANYTHING TO DO WITH IT IF THEY TELL ME I'VE GOT TO DO IT. BUT --

MS. BRICKLEY: THERE'S ALSO THAT CASE, THE BADILLO OPINION, WHICH IS A CALIFORNIA SUPREME COURT CASE WHICH I CITE RIGHT AFTER THAT WHICH I BELIEVE YOU PROBABLY WOULD HAVE THAT WHICH AGAIN IS THE SAME SITUATION.

THE COURT: I SAW BOTH BADILLO AND THERE'S ANOTHER CASE OUT THAT CITES BADILLO AND DIFFERENTIATES WHAT THEY MEANT AND BOTH OF WHICH ARE STATE SUPREME COURT CASES, BUT MY ASSUMPTION IS THAT LANCE M. SUPERCEDES ALL OF THOSE WHEN THEY SAY, WE NOW RELY SOLELY UPON THE U.S. SUPREME COURT.

MS. BRICKLEY: UNLESS THEY'RE CONSISTENT, WHICH IT WOULD BE, THOSE WOULD BE CONSISTENT WITH THE U.S. SUPREME COURT CASE. AS LONG AS THEY'RE CONSISTENT IT WOULD STILL BE GOOD LAW. THOSE WOULD BE CONSISTENT WITH THE U.S.

THE COURT: WHAT I'M CONCERNED WITH IS, WHAT WAS THE REASONING IN THE U.S. SUPREME COURT CASE TO DETERMINE WHETHER OR NOT THAT REASONING APPLIES TO THE FACT SITUATION IN THIS CASE?

AND I SAY I DON'T KNOW REID. ARE YOU FAMILIAR WITH REID?

MS. KENFIELD: NO.

THE COURT: YOU COULD HAVE STAYED AT HOME AND NURSED YOUR COLD, LADY, ALL THE GOOD YOU'RE DOING ME TODAY.

GO AHEAD.

MS. BRICKLEY: THIS IS HORRIBLE. I SHOULD HAVE XEROXED THAT CASE. I GUESS I WAS THINKING THAT WE HAD THAT HERE BUT I'VE READ SO MANY CASES I CAN'T QUITE REMEMBER WHETHER THEY SPECIFICALLY ADDRESS THAT, BUT I KNOW ALMOST EVERY CASE THAT I ADDRESSED, THE WAY THEY FRAMED THE ISSUE WAS AROUND THIS ISSUE OF ABANDONMENT.

THE PROSECUTION'S ARGUMENT IS GENERALLY SIMILAR TO YOUR LINE OF THINKING, I THINK, WHICH IS THAT IF SOMEBODY VOLUNTARILY DROPS SOMETHING, EVEN IF IT'S IN RESPONSE TO POLICE -- ILLEGAL POLICE CONDUCT, THAT'S A VOLUNTARY ACT AND THEREFORE THAT SORT OF DISSIPATES THE TAINT OF THE PRIOR ILLEGALITY. THAT'S THE DISTRICT ATTORNEY'S ARGUMENT AND ALL OF THESE CASES.

THE COURT'S RESPONSE IS CONSISTENTLY WHEN THEY TALK ABOUT THIS ABANDONMENT THEY COMPARE IT OFTEN TO A CONSENT TYPE OF THING WHERE SOMEBODY CONSENTS TO A SEARCH BUT THE COURT FINDS THAT THAT CONSENT WAS THE PRODUCT OF A PRIOR ILLEGAL DETENTION, THAT IT'S NOT VOLUNTARY, YOU CANNOT CONSIDER SOMETHING VOLUNTARY WHEN IT IS IN DIRECT RESPONSE TO THE UNLAWFUL POLICE CONDUCT.

AND THE VERY FEW, FEW CASES WHICH HAVE GONE THE OTHER WAY ARE ALL DISTINGUISHABLE IN THE SENSE, EXCEPT WITH THE POSSIBLE EXCEPTION OF PATRICK WHICH I JUST THINK IS BASICALLY NOT INCONSISTENT WITH ALL OTHER CASES, THEY ALL ARE DISTINGUISHABLE IN THAT THERE'S SOMETHING THAT DISSIPATES IT.

IN THE ROBERT OPINION THAT THE DISTRICT ATTORNEY CITES WHAT THE MINOR

DOES IN THAT CASE IS HE CONTINUES TO COMMIT --

THE COURT: LET ME INTERRUPT YOU BECAUSE MY MIND SET IS SUCH THAT IF I'VE GOT TO DO IT BECAUSE U.S. SUPREME COURT SAYS DO IT, I'LL DO IT. UNLESS THEY TELL ME I'VE GOT TO DO IT, I'M NOT GOING TO DO IT BECAUSE I THINK THE REASONING IS FLAWED.

MS. BRICKLEY: I'M NOT GOING TO CONVINCE YOU OF THE REASONING BUT THAT'S WHAT THEY TALK ABOUT, THE CASES. AND I BELIEVE REID HAS A DISCUSSION OF THIS ISSUE OF ABANDONMENT AND IT'S NOT A VOLUNTARY ABANDONMENT IS THE REASONING THEY USE, AND THAT'S WHAT THE FEDERAL CASES I GAVE YOU TALK ABOUT, THAT ALSO AS WELL AS ALL OTHER STATE CASES; THAT IF IT'S NOT -- IF IT'S IN RESPONSE TO THIS POLICE CONDUCT, IT'S NOT A VOLUNTARY ABANDONMENT, IT'S NOT A VOLUNTARY ACT.

THE COURT: NOW, IS REID THE ONLY U.S. SUPREME COURT CASE THAT YOU HAVE ON THAT POINT?

MS. BRICKLEY: I THINK IT IS. LET ME JUST DOUBLECHECK. THERE'S SOME OTHER ONES LIKE WONG SUN, WHICH YOU KNOW.

THE COURT: THAT'S ON AN ANCILLARY POINT AS I UNDERSTAND.

MS. BRICKLEY: YEAH. IT DOESN'T DIRECTLY, ALTHOUGH I WOULD BE INTERESTED IN READING THAT.

ALSO THE ONES I CITED AT THE END WHICH REFER TO THE CONSENT, AND IT'S THE EXACT SAME RATIONALE WHERE THE CONSENT IS THE PRODUCT OR IS THE RESULT OF UNLAWFUL POLICE CONDUCT, AND I'VE CITED SOME U.S. SUPREME COURT CASES THE LAST COUPLE OF PAGES OF THE BRIEF ON THAT PROPOSITION.

MAYBE THEY WERE FED. CASES. I'M SORRY. I GUESS THEY WERE JUST FEDERAL CASES. I THOUGHT IT WAS U.S. SUPREME COURT, THOSE TWO FED. CASES.

SO I GUESS THAT IS -- HERE WE GO. FLORIDA VS. BOYER. THAT'S THE OTHER ONE.

THE COURT: ALL RIGHT.

MS. BRICKLEY: CONSENT AFTER ILLEGAL DETENTION, RIGHT.

THE COURT: WHAT I'LL WANT THEN ARE COPIES OF REID AGAINST GEORGIA, 1980 CASE, 448 U.S. 438, AND I WILL WANT -- YOU WANT ME TO TAKE A LOOK AT WONG SUN?

MS. BRICKLEY: YEAH. I'D BE INTERESTED TO SEE IT MYSELF.

THE COURT: WONG SUN VS. U.S., 1963 CASE, 371 U.S. 471, AND FLORIDA AGAINST ROYER, R.O.Y.E.R., 1983 CASE, 460 U.S. 491. THOSE ARE THE THREE U.S. SUPREME COURT CASES THAT I UNDERSTAND YOU CONTEND RELATE TO THIS ISSUE IN SOME REASONABLY CONCRETE WAY.

WHEN CAN YOU GIVE ME COPIES OF THOSE?

MS. BRICKLEY: I COULD RUN OVER RIGHT NOW. IF YOU HAVE ANOTHER MATTER YOU'D WANT TO DO, I COULD RUN OVER.

WOULD YOU PREFER THAN WAIT AROUND TODAY AND GET THIS OVER WITH TODAY RATHER THAN COME BACK MONDAY?

THE MINOR'S MOTHER: YES.

MS. BRICKLEY: WHY DON'T I GO OVER RIGHT NOW AND I COULD PROBABLY BE BACK 45 MINUTES TO AN HOUR.

THE COURT: WHY DON'T WE PASS THIS. CAN YOU MAKE AN EXTRA COPY? I

KNOW YOU DON'T WANT TO BE TOO HELPFUL TO THE D.A. BUT THEY'D LIKE ONE TOO.

MS. BRICKLEY: I KNOW.

THE COURT: WE'LL PASS THIS. THANK YOU.

MS. BRICKLEY: BUT I WANT YOUR MONEY THOUGH, XEROX MONEY.

MS. KENFIELD: WAIT A MINUTE.

MS. BRICKLEY: THERE WAS ONE OUT OF STATE CASE I DID WANT YOU TO CONSIDER.

THE COURT: OUT OF STATE?

MS. BRICKLEY: MICHIGAN STATE.

(A BRIEF RECESS WAS TAKEN, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD:)

THE COURT: I WANT TO THANK MISS BRICKLEY FOR HAVING GIVEN ME COPIES OF THE THREE CASES, UNITED STATES SUPREME COURT CASES: TOMMY REID AGAINST THE STATE OF GEORGIA, WONG SUN AGAINST THE UNITED STATES AND FLORIDA AGAINST MARK ROYER.

I'VE READ ALL THREE OF THEM SOMEWHAT HURRIEDLY BUT I WENT OVER THEM AND I THINK I GOT THE GIST OF IT. TELL ME IF YOU DISAGREE WITH ME.

AS TO THE TOMMY REID CASE THERE WAS AN ACTUAL STOP MADE AND AFTER THE STOP THE OFFICERS WANTED TO GO FURTHER IN THEIR INVESTIGATION. THEY ASKED THE DEFENDANT PERMISSION TO DO SO. I THINK THIS IS THE ONE WHEREIN HE SAID YES, BUT WHEN HE STARTED WALKING WITH THEM TO GIVE THEM PERMISSION TO CONDUCT A SEARCH HE TOOK OFF RUNNING AND THREW THE STUFF AWAY.

THE KEY THING THERE APPEARS TO ME IS THERE WAS AN ACTUAL STOP BY THE POLICE IN THAT SITUATION, AND THE COURT DETERMINED THAT THE INITIAL STOPPING CONSTITUTED A SEIZURE. THIS WASN'T A SITUATION OF A THREATENED DETENTION OR SIMPLY A THREATENED SEARCH, AND I THINK THAT DIFFERS SUBSTANTIALLY FROM WHAT WE HAVE HERE.

WHAT WE HAVE IS THE QUESTION WHETHER THERE IS A THREATENED DETENTION OR A THREATENED SEARCH BUT NO ACTUAL STOP BEFORE THE DISCARDING OF THE CONTRABAND.

AND THE WONG SUN – WELL, GO BACK. THE FLORIDA AGAINST MARK ROYER CASE, AGAIN I FIND THAT THERE WAS AN ACTUAL DETENTION AND A SEARCH AND BASED UPON WHAT THE COURT FOUND TO BE INVALID CONSENTS, BUT THE FACT OF THE MATTER IS, THIS WAS AGAIN NOT THE CASE OF A THREATENED DETENTION OR A THREATENED SEARCH BUT WAS AN ACTUAL DETENTION AND AN ACTUAL SEARCH. IT WAS NOT A THROW AWAY SITUATION AT ALL.

AND IN WONG SUN, THE WONG SUN CASE HAD TO DO, AS WE HAD AGREED EARLIER I THINK, WITH THE DOCTRINE OF THE FRUITS OF A TAINTED DETENTION. AND IN THAT SITUATION IT HAD NOTHING TO DO WITH SOMETHING TO BE THROWN AWAY BASED UPON A THREATENED SEARCH OR A THREATENED DETENTION. AGAIN THERE WAS -- THERE WERE ACTUAL DETENTIONS AND THERE WAS A STATEMENT OR A GROUP OF STATEMENTS ACTUALLY THAT WERE GIVEN DURING THAT DETENTION, AND THE DETERMINATION WAS WHETHER OR NOT THOSE STATEMENTS WERE ADMISSIBLE.

I DON'T FIND ANY OF THESE CASES TO DEAL WITH THE ISSUE THAT WE'RE FACED

WITH HERE. I'LL HEAR HOW YOU READ THEM DIFFERENTLY.

MS. BRICKLEY: WELL, TWO REASONS. I REALLY DON'T SEE THE DIFFERENCE BETWEEN WHETHER THERE'S AN ACTUAL DETENTION OR, AS YOU SAY, THE THREAT OF A DETENTION.

FIRST OF ALL, THE MOST RECENT CASE ON THIS, WASHINGTON, SPECIFICALLY SAYS THAT THEY'RE NO LONGER USING THE LANGUAGE OF A THREAT OF THE DETENTION. sOME OF THE STATE COURT OPINIONS I GAVE YOU ALSO TALKED ABOUT THIS. THEY SAY ONCE SOMEBODY IS PURSUED, THERE IS A SEIZURE; EVEN IF THE PERSON, IT ISN'T PHYSICALLY IN THEIR POSSESSION, THAT IS A SEIZURE, THAT IS A DETENTION.

THE WASHINGTON OPINION, WHERE IT WAS IDENTICAL TO THIS SITUATION, HE'S BEING CHASED AND THEY CALL THAT A DETENTION ITSELF, BUT WHETHER YOU CALL IT THREATENED OR AN ACTUAL DETENTION, I REALLY DON'T SEE WHAT THE DIFFERENCE IS. I MEAN, IN THE REID OPINION THE PERSON, THE DEFENDANT IN THAT CASE, COULD HAVE, AS YOU HAD SUGGESTED LAST TIME WE WERE IN COURT, COULD HAVE, RATHER THAN RUNNING AND DISCARDING THE PROPERTY JUST AS THE SAME AS IN THIS, COULD HAVE JUST WAITED, HAD THE OFFICERS SEARCH HIM, AND THEN COME TO COURT, AND IT WOULD HAVE CLEARLY HAVE BEEN AN UNLAWFUL SEARCH. BUT HE, AS IN THIS CASE, PROCEEDED TO RUN AND DISCARD THE EVIDENCE.

THE COURT: YES, BUT HE HAD BEEN DETAINED FIRST.

MS. BRICKLEY: I DON'T UNDERSTAND WHAT THE REAL DISTINCTION RATIONALLY IS. THE FACT OF THE MATTER IS, THERE'S AN UNLAWFUL ACT WHETHER IT'S A THREATENED DETENTION OR A DETENTION, AND AS A RESULT OF THAT UNLAWFUL ACT

THE DEFENDANT RESPONDS NOT VOLUNTARILY BUT RESPONDS TO THAT UNLAWFUL ACT. AND I JUST DON'T SEE WHAT THE DIFFERENCE IS RATIONALLY BETWEEN, BETWEEN WHETHER IT'S A THREATENED OR -

THE COURT: THE DIFFERENCE I SEE IS WHETHER OR NOT THE UNITED STATES SUPREME COURT HAS HANDED DOWN A RULE THAT I'VE GOT TO FOLLOW. IN THIS, IN THESE CASES, THE ONE I WAS SPEAKING ABOUT, THERE HAVE BEEN ACTUAL PHYSICAL DETENTIONS WHICH DIFFER FROM THIS CASE, WHICH MEANS THAT THAT'S WHAT I'M LOOKING AT. I'M TRYING TO FIND A CASE THAT SAYS ANY SIMILAR TYPE CASES, JUDGE, YOU'VE GOT TO FOLLOW THAT RULE WHETHER YOU LIKE IT OR NOT. THAT'S THE ONLY PLACE THAT I FIND IT RELEVANT.

FRANKLY, I DON'T AGREE WITH THEIR REASONING IN THE DETENTION CASES. I THINK THEIR REASONING IS FLAWED, THAT THEY NEED TO FIND THAT IT WAS IN FACT AN ILLEGAL SEARCH, AND IF THEY FIND IT'S AN ILLEGAL SEARCH, THEN THEY OUGHT TO SUPPRESS THE EVIDENCE.

BUT, YOU KNOW, I CAN'T SECOND-GUESS THE UNITED STATES SUPREME COURT, BUT I DON'T HAVE TO STRETCH THE OPINION BEYOND WHAT THEY SAY, AND THAT'S WHERE I SEE THE DIFFERENCE BETWEEN THESE CASES AND THE CASE WE'VE GOT HERE.

MS. BRICKLEY: WELL, AS I SAID IN RESPONSE TO U.S. SUPREME COURT CASES, I DON'T -- I MEAN GRANTED, I GRANT THERE IS A FACTUAL, THERE IS SOMEWHAT OF A FACTUAL DISTINCTION THERE. I JUST DON'T SEE HOW THE FACTUAL DISTINCTION TRANSLATES INTO ANY DIFFERENCE IN THE REASONING. I THINK WE'RE STILL DEALING WITH THE FRUIT TYPE OF ANALOGY.

IN ADDITION, I THINK WE HAVE A CALIFORNIA SUPREME COURT CASE WHICH IS

NOT INCONSISTENT WITH ANY FEDERAL CASES, IN FACT CONSISTENT WITH THE FEDERAL LINE OF REASONING, AND A MORE RECENT FIRST DISTRICT COURT OF APPEALS OPINION, MORE RECENT THAN PATRICK, BOTH WHICH DEAL WITH SITUATIONS, BADILLO AND WONG SUN, BOTH DEAL WITH SITUATIONS IN WHICH THE PERSON WAS NOT ACTUALLY DETAINED, WAS NOT ACTUALLY SEARCHED, AND THE PERSON FLED AND THE PERSON DISCARDED EVIDENCE. AND IN BOTH OF THOSE OPINIONS WHICH SPECIFICALLY ADDRESS THAT ISSUE AND --

THE COURT: YOU AND I BOTH KNOW THAT. AND AS WE HAVE AGREED, THERE ARE DIVERGENT COURT OF APPEAL DECISIONS ON THAT POINT, ON A THREATENED --

MS. BRICKLEY: ONE OF THE CASES I TALKED ABOUT IS A CALIFORNIA SUPREME COURT DECISION.

THE COURT: -- WHERE THEY COME DOWN.

WHICH CASE ARE YOU REFERRING TO?

MS. BRICKLEY: THE BADILLO. WHAT HAPPENS IN BADILLO, THE 46 CAL.2ND OPINION, WHAT HAPPENS IN THERE IS THAT THEY UNLAWFULLY ENTER ABOUT BADILLO'S HOUSE BUT THEY DO NOT DETAIN HIM. IN FACT THEY DON'T THREATEN TO SEARCH HIM OR ANYTHING. HE RUNS OUT THE DOOR AND DISCARDS THE PROPERTY AND THE COURT SAYS IT'S GOT TO GO.

THE COURT: I READ BADILLO. I THINK THEY REACHED THAT DECISION ON THE SAME BASIS THAT WASHINGTON REACHED ITS DECISION. THEY'RE SIMPLY SAYING THAT CERTAIN TRANSGRESSIONS BY THE POLICE ARE SO EGREGIOUS, ARE SO BAD, THAT NOTHING THAT THEY TURN UP OUGHT TO BE PERMITTED TO BE USED.

IN THE WASHINGTON CASE THEY SAID, FOR POLICE TO CHASE SOMEBODY DOWN AND GET SOMETHING AND THEY THROW SOMETHING AWAY WHEN THE ONLY, THE BASIC REASON WHY THE POLICE ARE DOING IT IS BECAUSE OF THE RACE OF THE PERSON, THEY SAID THAT'S SO GOD AWFUL BAD THAT WE DON'T GIVE A DAMN WHAT YOU FIND, THAT'S NOT GOING TO GO INTO EVIDENCE.

IN BADILLO I'M READING THEM AS SAYING WHEN YOU BREAK INTO SOMEBODY'S HOUSE WHEN YOU HAVE NO LEGAL RIGHT TO DO THAT, WHATEVER YOU FIND AS A RESULT OF THAT IS SO EGREGIOUS THAT WE WILL NOT LET IT COME IN, PERIOD.

NOW, THOSE CASES ARE BEING BASED UPON THAT PRINCIPLE IN AND OF ITSELF.

MS. BRICKLEY: WELL, THE CASES TALK ABOUT THE DIFFERENT THINGS THAT THE COURT SHOULD CONSIDER IN DECIDING WHERE THIS, ABANDONMENT, WHERE THERE'S ENOUGH ATTENUATION BETWEEN THE ILLEGAL CONDUCT OF THE POLICE AND THE ACT OF THE DEFENDANT. AND THAT'S ONE OF THE FACTORS, BUT THEY ALSO TALK ABOUT THE PROXIMITY WHICH, AND CLEARLY IN THIS CASE THERE WAS ONE MINUTE LESS THAN IN WASHINGTON, AND THEY TALK ABOUT WHETHER THERE WERE ANY INTERVENING ACTS SUCH AS SOMETHING THE DEFENDANT HIMSELF DOES UNLAWFULLY, AS IN THE ROBERT OPINION.

THIS CASE, IT SEEMS TO ME, IS SO CLOSE TO WASHINGTON FACTUALLY. I MEAN IN THIS CASE THE OFFICER SEES THESE MINORS ARE STANDING AROUND A CAR, I MEAN, YOU KNOW, THE OFFICERS -- HUDDLED, BUT WHEN I ASKED HIM --

THE COURT: I KNOW IT'S CLOSE TO WASHINGTON. ON WASHINGTON, IF I WERE FOLLOWING IT STRAIGHT, YOU WON'T HAVE ANY ARGUMENT.

MS. BRICKLEY: BUT I GUESS THE POINT I'M MAKING IS, I THINK THE CONDUCT IN THIS CASE IS ALSO EGREGIOUS. THESE PEOPLE WERE DOING NOTHING WRONG. THEY WERE STANDING AROUND A CAR AND THEY RAN FROM THE POLICE OFFICER. THE LAW IS CLEAR THAT PEOPLE HAVE A RIGHT TO DO THAT. I JUST DON'T SEE THAT THERE WAS ANY REASON.

AND AS I SAID IN MY BRIEF, I THINK IT'S A VERY DANGEROUS PRECEDENT, BECAUSE IF YOU SAY THAT BECAUSE THAT AN OFFICER CAN MAKE AN UNLAWFUL DETENTION AND THEN IF THE PERSON DISCARDS SOMETHING IT CAN COME INTO COURT, WHAT IS TO STOP POLICE OFFICERS FROM THEN KNOWING THAT, KNOWING THAT IT'S WORTH IT TO GIVE AN ATTEMPT TO CHASE AFTER SOME KID WHO'S JUST STANDING ON THE STREET, BECAUSE WE ALL KNOW THAT HAPPENS, AND IN RESPONSE TO THAT THEY'RE GOING TO DISCARD SOMETHING. AND WHO CARES IT WAS UNLAWFUL WHAT THEY DID TO BEGIN WITH, THEY CAN GET EVIDENCE INTO COURT. THE WHOLE PURPOSE OF THE EXCLUSION RULE IS DETERRENCE. AND I THINK IF THAT'S THE PURPOSE --

THE COURT: DON'T THESE CASES SAY THAT ALL, ALL ILLEGAL ACTIVITY OF POLICE OFFICERS DOES NOT JUSTIFY A SUPPRESSION OF THE EVIDENCE AS ULTIMATELY SUSTAINED?

MS. BRICKLEY: IF IT'S ATTENUATED.

THE COURT: BUT DON'T THEY SAID JUST BECAUSE A COP ACTS ILLEGALLY, THAT IN AND OF ITSELF IS NOT DETERMINATIVE OF WHETHER OR NOT THE EVIDENCE OUGHT TO BE SUPPRESSED?

MS. BRICKLEY: RIGHT.

THE COURT: IF I FOLLOW YOUR REASONING, THOUGH, EVERY TIME THE COPS

DO SOMETHING AUTOMATICALLY WRONG, AUTOMATICALLY IT SHOULD BE SUPPRESSED.

MS. BRICKLEY: IF IT'S A DIRECT CONNECTION THERE.

THE COURT: YOU SAY DIRECT CONNECTION IF THE MINOR DOES SOMETHING, IF HE THROWS THE STUFF AWAY?

MS. BRICKLEY: IF HE – 10 MINUTES LATER OBVIOUSLY, YOU KNOW, THERE WOULDN'T BE A DIRECT CONNECTION, BUT WHEN HE SEES THE OFFICER RUNNING TOWARDS HIM, LOOKS STARTLED AT HIM AND THEN THROWS THE STUFF, I THINK BY NO STRETCH OF THE IMAGINATION CAN YOU SAY THAT THERE WASN'T A DIRECT LINK THERE.

THE COURT: I KNOW WHY HE DID IT. I'M NOT DUMB. I MEAN I KNOW WHY HE DID IT. THE QUESTION IS WHETHER OR NOT IT OUGHT TO BE SUPPRESSED. LET ME –

WERE YOU THE ONE WHO TOLD ME THERE'S A CASE UP NOW BEFORE THE UNITED STATES SUPREME COURT ON THIS ISSUE?

MS. KENFIELD: THAT'S WHAT I WAS TOLD BY MISS QUIST OF OUR OFFICE. I SPECIFICALLY ASKED FOR UNITED STATES SUPREME COURT AUTHORITY AND SHE SAYS THERE'S SOMETHING PENDING, BUT....

THE COURT: BUT THEY HAVE GRANTED CERTIORARI ON IT?

MS. KENFIELD: SOMETHING IS PENDING. THERE IS A CASE PENDING WITH REGARD TO ABANDONED AND THREATENED LEGAL DETENTION.

THE COURT: ONE OF MY QUESTIONS IS, IF IT'S PENDING, IF THEY'VE DECIDED THEY WOULD HEAR IT, WHY WOULD THEY DO THAT IF THEY'VE ALREADY RULED ON IT?

MS BRICKLEY: PROBABLY BECAUSE IT'S AN ISSUE THAT HAS ARISEN SO OFTEN AND THERE'S NO DIRECT DISCUSSION OF IT. AND, TO ME, THE RULING CLEARLY IMPLIES THAT, BECAUSE OF THE FACTS OF THE SITUATION, BUT THEY DON'T DIRECTLY ADDRESS THAT ISSUE. IT'S AN ISSUE THAT'S OBVIOUSLY – I MEAN IN THIS STATE WE'VE HAD A CONFLICT OF AUTHORITY. I DON'T KNOW. IT'S POSSIBLE THE SUPREME COURT WILL CHANGE ITS RULING. I CAN'T PREDICT WHAT THE NEW SUPREME COURT WILL DO BUT WHAT I'M SAYING IS, BY THE SAME RATIONALE YOU CAN SAY IF THEY DID WANT TO CHANGE THE RULING IT'S BECAUSE IT IS THE WAY IT IS NOW AND BECAUSE THE FEDERAL COURTS HAVE CONSISTENTLY. AND I'VE GIVEN YOU FEDERAL COURT OF APPEAL OPINIONS WHICH WOULD ALSO BE BUT THAT'S ALSO –

THE COURT: WE'RE NOT BOUND BY THOSE AND THEY GO ALL OVER THE LOT WITH SLOPPY REASONING BUT, AT ANY RATE, WE'RE NOT BOUND.

MS. BRICKLEY: THAT IS THE FEDERAL LAW.

THE COURT: WITH THE SLOPPY REASONING THEY HAVE HELD WHAT YOU'VE JUST SAID THEY HELD. WE'RE NOT QUARRELING WITH THAT.

ALL RIGHT. HAVE YOU GOT ANYTHING YOU WANT TO ADD?

MS. KENFIELD: NO, YOUR HONOR, NOT THAT ISN'T IN MY BRIEF OR THAT THE COURT HAS ALREADY STATED.

THE COURT: ALL RIGHT. IS THE MATTER SUBMITTED?

MS. BRICKLEY: YES.

MS. KENFIELD: YES.

THE COURT: THE MOTION IS DENIED.

NOW WHERE ARE WE?

MS. BRICKLEY: I THINK WE WILL HAVE A STIPULATION AT THIS POINT; IS THAT RIGHT? LET ME JUST HAVE A SECOND.

MS. KENFIELD: THE ONLY THING I WOULD LIKE TO DO, JANICE, IS HAVE MARKED, FOR EASE OF THE COURT DISPOSING OF THE MONEY AND THE BEEPER --

THE COURT: WHAT DO YOU WANT?

MS. KENFIELD: YOUR HONOR, I'D LIKE -- LET ME GET OFFICER MCCOLGIN.

IN PREPARATION FOR THE STIPULATION, YOUR HONOR, I WOULD LIKE TO HAVE MARKED AS PETITIONER'S NUMBER 2, AN OAKLAND POLICE DEPARTMENT EVIDENCE ENVELOPE THAT OFFICER MCCOLGIN HAS HANDED ME, WITH THE REPORT NUMBER 88-44699, WITH AN EVIDENCE TAG ATTACHED WITH THE NAME OF THE MINOR, HODARI DULAN, THE ADDRESS 6225 FOOTHILL. I'D LIKE THAT MARKED AS PETITIONER'S 2.

THE COURT: YES.

(PETITIONER'S EXHIBIT NO. 2, AN EVIDENCE ENVELOPE, WAS MARKED FOR IDENTIFICATION.)

MS. KENFIELD: I WOULD LIKE TO HAVE MARKED AS PETITIONER'S 2A, A SMALL MANILA ENVELOPE WHICH I HAVE REMOVED FROM THE LARGER ENVELOPE, AND IN ITS CONTENTS. THE CONTENTS OF THE SMALL MANILA ENVELOPE IS A MOTOROLA BEEPER OR TELEPHONE PAGING DEVICE WITH THE NUMBER 1917 -- EXCUSE ME -- 191478.

THE COURT: IT WILL BE SO MARKED.

(PETITIONER'S EXHIBIT NO. 2A, A MANILA ENVELOPE WITH A MOTOROLA BEEPER, WAS MARKED FOR IDENTIFICATION.)

MS. KENFIELD: I WOULD LIKE TO HAVE MARKED AS PETITIONER'S NUMBER 3, A GROUP EXHIBIT, AN OAKLAND POLICE DEPARTMENT MONEY ENVELOPE THAT IS SEALED WITH THE PROPERTY SECTION MONEY SEAL NUMBERED 09106, WITH THE OFFICER'S NAME OF BRIAN MCCOLGIN AND JERRY PERTOSO, AN EVIDENCE TAG SEAL ON IT WITH THIS MINOR'S NAME, HODARI DULAN.

I'D LIKE THE RECORD REFLECT THAT I AM OPENING THAT BY BREAKING THE SEAL.

JANICE, YOU'LL AGREE THAT IT'S SEALED?

MS. BRICKLEY: (NODS HER HEAD UP AND DOWN.)

MS. KENFIELD: AND REMOVING FROM IT SOME UNITED STATES CURRENCY: FIVE 20'S, ONE 10, TWO 5'S, AND 10 ONE'S. AND I'D LIKE THAT MARKED AS GROUP EXHIBIT PETITIONER'S 3.

THE COURT: I GET A TOTAL OF 130. IS THAT WHAT YOU GET?

THE CLERK: 30?

THE COURT: 130.

THE CLERK: YES.

THE COURT: ALL RIGHT. THAT WILL BE NUMBER 3 FOR IDENTIFICATION.

(PETITIONER'S EXHIBIT GROUP NO. 3, A MONEY ENVELOPE WITH CURRENCY, WAS MARKED FOR IDENTIFICATION.)

MS. KENFIELD: AND FOR THE PURPOSES OF HANDLING, I'LL MOVE THEM INTO EVIDENCE AT THIS TIME.

THE COURT: ANY OBJECTION? SHE MOVED THESE EXHIBITS INTO EVIDENCE. ANY OBJECTION?

MS. BRICKLEY: I OBJECT TO EVERYTHING. I DO OBJECT. I OBJECT TO ANYTHING OTHER THAN THE -- I THINK IT WAS THE FIRST EXHIBIT WHICH WAS THE ONE ROCK. I THINK THE OTHER EXHIBITS ARE IRRELEVANT. THERE'S BEEN, THERE WAS AN EXHIBIT WITH 15 ROCKS AND THERE'S BEEN NO TESTIMONY THAT MY CLIENT HAD ANYTHING TO DO WITH THAT EXHIBIT.

THE COURT: SHE'S MOVED 2, 2A AND 3, THESE ITEMS THAT SHE'S JUST HAD MARKED.

MS. BRICKLEY: I THINK THAT THE BEEPER AND THE MONEY ARE IRRELEVANT TO AN 11350 CHARGE.

THE COURT: ALL RIGHT. 2, 2A AND 3 WILL BE ADMITTED OVER OBJECTION.

(PETITIONER'S EXHIBIT NOS. 2, 2A AND 3 WERE ADMITTED INTO EVIDENCE.)

MS. KENFIELD: THAT'S ALL I WANTED TO DO IN PREPARATION FOR THE STIPULATION, YOUR HONOR.

THE COURT: ALL RIGHT. YOU WISH TO VOIR DIRE YOUR CLIENT?

MS. BRICKLEY: YEAH.

VOIR DIRE EXAMINATION

BY MS. BRICKLEY:

Q. HODARI, YOU HAVE A RIGHT TO HAVE A TRIAL ON WHETHER OR NOT YOU

POSSESSED COCAINE; DO YOU UNDERSTAND THAT?

A. YES.

Q. IN FACT THAT'S WHAT WE'VE ALREADY DONE, PART OF THAT TRIAL, AND YOU HAVE A RIGHT TO CONTINUE IN THIS TRIAL AND YOU HAVE A RIGHT TO HAVE MYSELF AS YOUR LAWYER FURTHER CROSS-EXAMINE THE WITNESSES. DO YOU UNDERSTAND THAT?

A. UH-HUH.

Q. YOU HAVE TO SAY YES OR NO OUT LOUD.

A. YES.

Q. YOU ALSO HAVE A RIGHT TO PRESENT EVIDENCE ON YOUR OWN BEHALF ON YOUR OWN SIDE AT THAT HEARING; DO YOU UNDERSTAND THAT?

A. YES. MEANING WITNESSES.

Q. RIGHT. YOU ALSO HAVE A RIGHT TO REMAIN SILENT. THAT MEANS YOU DON'T HAVE TO SAY ANYTHING THAT COULD BE USED AGAINST YOU. YOU CAN SIT BACK AND SEE IF THEY CAN PROVE THIS OR NOT WITHOUT SAYING ANYTHING YOURSELF; DO YOU UNDERSTAND THAT?

A. YES.

Q. DO YOU UNDERSTAND THAT IF YOU ADMIT THIS WE WILL NOT CONTINUE WITH THIS TRIAL, SO THEREFORE THE DISTRICT ATTORNEY WILL NOT HAVE TO CONTINUE TO FINISH PROVING, AN ATTEMPT TO PROVE BEYOND A REASONABLE DOUBT THAT YOU HAD THIS COCAINE; DO YOU UNDERSTAND THAT?

A. YES.

Q. AND Y U UNDERSTAND THAT. IS THAT WHAT YOU WANT TO DO? ARE YOU WILLING TO GIVE UP THOSE RIGHTS THAT I'VE JUST EXPLAINED TO YOU?

A. I WILL.

Q. YOU REALIZE YOU'RE GIVING UP THOSE RIGHTS IF YOU DO THAT?

A. YES.

Q. HAS ANYBODY THREATENED YOU OR PROMISED YOU ANYTHING TO GET YOU TO ADMIT THIS?

A. WELL, WHEN I GOT CAUGHT HE SAID THAT I'LL BE GOING TO VISION QUEST.

Q. BUT I MEAN TODAY, HAS ANYBODY PROMISED YOU ANYTHING? DO YOU FEEL THAT IF YOU, THAT SOMEBODY TELLING YOU SOMETHING ABOUT VISION QUEST IS ANY WAY CONNECTED WITH YOUR ADMITTING THIS TODAY? DO YOU FEEL LIKE IF YOU ADMIT THIS --

A. NO, BUT IF I DIDN'T ADMIT IT I WAS TO GO ON THE STREETS AND IF HE SAW ME AGAIN, THE GUY, JERRY, HE WOULD BE MAD AT ME BECAUSE LAST TIME HE WAS HERE HE LOOKED AT ME REAL MEAN.

THE COURT: LET'S MAKE SURE THAT I FULLY UNDERSTAND WHERE YOU'RE COMING FROM. WHAT SHE'S ASKING YOU IS, YOU'RE SAYING TODAY YOU WISH TO ADMIT THAT YOU COMMITTED THESE OFFENSES?

THE MINOR: I ADMIT TO HAVING THE ONE ROCK IN MY POSSESSION.

THE COURT: THAT'S A CRIME. DO YOU UNDERSTAND IT'S AGAINST THE LAW TO POSSESS ANY COCAINE AT ALL?

THE MINOR: YES.

THE COURT: ANY ONE ROCK?

THE MINOR: (THE MINOR NODS HIS HEAD AND DOWN.)

THE COURT: NOW, WHAT YOU'VE JUST TOLD YOUR LAWYER IS YOU WANT TO ADMIT THAT.

THE MINOR: YES.

THE COURT: NOW, WHAT SHE IS ASKING YOU IS, ARE YOU ADMITTING THAT BECAUSE SOMEBODY PROMISED YOU SOMETHING IF YOU WOULD ADMIT IT? DID ANYBODY PROMISE YOU SOMETHING IF YOU WOULD ADMIT IT?

THE MINOR: NO.

THE COURT: DID ANYBODY THREATEN TO DO SOMETHING TO YOU IF YOU WOULD NOT ADMIT IT?

THE MINOR: NOT VERBALLY.

THE COURT: ANY KIND OF WAY DID ANYBODY THREATEN YOU TO DO SOMETHING UNLESS YOU ADMITTED THIS?

THE MINOR: NO. JUST BY HIS LOOKS.

THE COURT: BY ANYTHING. ARE YOU SAYING YOU'RE DOING IT BECAUSE OF SOME THREAT THAT SOMEBODY HAS MADE TO YOU?

THE MINOR: HIS LOOKS, YES.

THE COURT: THEN I WON'T ACCEPT AN ADMISSION.

MS. BRICKLEY: I THINK I DO KNOW. I DID NOTICE, JUST FOR THE RECORD, THAT THE POLICE OFFICER DURING HIS TESTIMONY WAS STARING AT --

CLIENT?

MS. BRICKLEY: -- AT THE MINOR IN A WAY WHICH COULD BE CONSTRUED AS --

CAN I JUST TALK TO HIM AGAIN? I WANT TO MAKE SURE THAT THAT IS IT.

(MS. BRICKLEY IS SPEAKING WITH THE MINOR.)

THE COURT: WE'LL PROCEED WITH THE HEARING THEN.

MS. BRICKLEY: THEN WE'LL CONTINUE WITH THE HEARING.

THE COURT: HE'S IN CUSTODY, RIGHT?

MS. BRICKLEY: YES.

THE COURT: ALL RIGHT. WE'LL CONTINUE IT OVER TO TOMORROW MORNING AT 10:00 O'CLOCK. 10:00 O'CLOCK TOMORROW MORNING FOR FURTHER HEARING.

(THEREUPON, THE PROCEEDINGS WERE ADJOURNED FOR THE DAY AND AND CONTINUED TO MAY 20, 1988.)

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FRIDAY, MAY 20, 1988 8:45 A.M.

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THE COURT OFFICER: YOUR HONOR, THIS IS THE MATTER OF HODARI DULAN. IT'S CONTINUED FOR CONTESTED HEARING FROM YESTERDAY.

ARE YOU HODARI DULAN?

THE MINOR: YES.

THE COURT OFFICER: HODARI'S BEING REPRESENTED BY MISS BRICKLEY FROM THE P.D.'S OFFICE AND THE DISTRICT ATTORNEY'S OFFICE IS REPRESENTED BY MISS ANN KENFIELD.

THERE ARE NO FAMILY MEMBERS PRESENT.

THE COURT: HAD YOU RESTED, MISS KENFIELD?

MS. KENFIELD: NO, YOUR HONOR. THE COURT HAD DENIED THE MOTION TO SUPPRESS EVIDENCE AND THE MATTER WAS CONTINUED TODAY FOR FURTHER HEARING.

THE COURT: YES. I THOUGHT YOU HAD PUT ON ALL OF YOUR EVIDENCE.

MS. KENFIELD: NO. I JUST HAD SOME ITEMS MARKED IN THE ANTICIPATION OF A POSSIBLE STIPULATION SO THE COURT WOULD HAVE THEM IN THE COURT'S EVIDENCE --

THE COURT: ALL RIGHT.

MS. KENFIELD: -- FOR POSSIBLE DISPOSAL.

THE COURT: YOU MAY CONTINUE.

MS. KENFIELD: THANK YOU. I WOULD FIRST ASK FOR STIPULATION THAT THE EVIDENCE RECEIVED IN THE 700.1, THE

TESTIMONY RECEIVED IN THE 700.1 BE CONSIDERED FOR THE JURISDICTIONAL HEARING.

MS. BRICKLEY: SO STIPULATED.

THE COURT: ALL RIGHT. THE RECORD WILL SO SHOW.

MS. KENFIELD: PETITIONER WOULD RE-CALL OFFICER PERTOSO.

THE COURT: HE OUGHT TO REMEMBER TO TELL THE TRUTH.

OFFICER, PERTOSO, YOU'VE BEEN PREVIOUSLY SWORN. YOU'RE STILL UNDER OATH, STILL SWORN TO TELL THE TRUTH.

THE WITNESS: OKAY.

JERRY PERTOSO,

RESUMED THE WITNESS STAND AND TESTIFIED FURTHER AS FOLLOWS:

DIRECT EXAMINATION

BY MS KENFIELD:

Q. SHOWING YOU 1A, OFFICER PERTOSO, DO YOU RECOGNIZE THAT?

A. THIS IS THE SAME SUSPECTED ROCK COCAINE THAT MR. DULAN DISCARDED THE DAY HE WAS ARRESTED.

Q. AFTER HE DISCARDED IT, THE ROCK OF COCAINE, YOU DETAINED HIM; IS THAT CORRECT?

A. YES.

Q. AND YOU PLACED HIM UNDER ARREST?

A. YES.

Q. PURSUANT TO THAT ARREST DID

YOU SEARCH HIM?

A. YES.

Q. DID YOU RECOVER ANYTHING OF -- THAT YOU CONSIDERED OF EVIDENTIARY SIGNIFICANCE?

A YES.

Q. WHAT DID YOU RECOVER?

A. I RECOVERED SOME U.S. CURRENCY. I THINK IT WAS $130 AND A PAGER.

Q. SHOWING YOU WHAT HAS BEEN MARKED AS, ALREADY MARKED AS PETITIONER'S 2A, AN ENVELOPE CONTAINING A PAGER, DO YOU RECOGNIZE THAT?

A. THIS IS THE SAME PAGER THAT MR. DULAN HAD THE DAY HE WAS ARRESTED, ON HIS LEFT WAISTBAND.

Q. WHAT DID YOU DO WITH THE PAGER?

A. GAVE IT TO MY PARTNER, OFFICER MCCOLGIN, TO TURN INTO PROPERTY.

Q. WITH RESPECT TO THE ROCK OF COCAINE THAT YOU SAW THE MINOR DROP, WHAT DID YOU DO WITH THAT?

A. I ALSO GAVE IT TO MY PARTNER AND HE TURNED IT INTO THE CRIMINALISTIC SECTION AT THE END OF OUR SHIFT THAT EVENING.

Q. SHOWING YOU WHAT HAS BEEN MARKED AS PETITIONER'S GROUP EXHIBIT 3, DO YOU RECOGNIZE THAT MONEY?

A. WELL, NOT REALLY BUT OTHER THAN THE FACT IT CAME OUT OF THAT ENVELOPE.

Q. HANDING YOU PETITIONER'S 2 -- 3. EXCUSE ME. STRIKE 2. HANDING YOU PETITIONER'S NUMBER 3, DO YOU RECOGNIZE THAT?

A. YES. THIS IS THE SAME MONEY ENVELOPE THAT WE PLACED THE CURRENCY IN THAT WAS RECOVERED FROM MR. DULAN THE DAY HE WAS ARRESTED.

Q. AND DID YOU INDICATE THE AMOUNTS AND THE DENOMINATIONS?

A. MY PARTNER DID.

Q. AND WERE YOU PRESENT WHEN HE DID THAT?

A. YES.

MS. KENFIELD: NO FURTHER QUESTIONS.

THE COURT: CROSS.

MS. BRICKLEY: NO QUESTIONS.

THE COURT: MAY THE WITNESS BE EXCUSED?

MS. KENFIELD: YES.

THE COURT: THE WITNESS IS EXCUSED. THANK YOU.

THE WITNESS: THANK YOU.

(WHEREUPON, THE WITNESS WAS EXCUSED.)

MS. KENFIELD: PETITIONER'S NEXT WITNESS WILL BE RE-CALLING OFFICER MCCOLGIN.

THE COURT: OFFICER MCCOLGIN, YOU'RE STILL UNDER OATH, STILL SWORN TO TELL THE TRUTH. JUST HAVE A SEAT, PLEASE.

BRIAN MCCOLGIN,

RESUMED THE WITNESS STAND AND TESTIFIED FURTHER AS FOLLOWS:

DIRECT EXAMINATION

BY MS. KENFIELD:

Q. OFFICER MCCOLGIN, AFTER YOU RESPONDED TO OFFICER PERTOSO'S REPORT AND YOU RESPONDED TO WHERE HE HAD THIS MINOR IN CUSTODY, DID HE GIVE YOU ANYTHING?

A. YES.

Q. WHAT DID HE GIVE YOU?

A. HE GAVE ME A SMALL WHITE CHUNK OF SUSPECTED ROCK COCAINE.

Q. HANDING YOU PETITIONER'S 1, DO YOU RECOGNIZE THAT?

A. YES, I DO.

Q. WHAT IS THAT?

A. THIS IS THE SMALL ROCK, SMALL CHUNK OF SUSPECTED COCAINE THAT WAS GIVEN ME BY OFFICER PERTOSO.

Q. WHAT DID YOU DO WITH IT?

A. I PLACED IT IN THIS CLEAR ZIP-LOCK BAG. I PLACED MY SERIAL NUMBER ON THE OUTSIDE OF THE BAG, 7465 P. I THEN PLACED IT IN A CRIMINALISTIC'S ENVELOPE AND IT WAS LATER TURNED INTO THE CRIMINALISTIC'S SECTION AT THE OAKLAND POLICE DEPARTMENT.

Q. HANDING YOU PETITIONER'S NUMBER 1, DO YOU RECOGNIZE THAT?

A. YES.

Q. WHAT IS THAT?

A. THIS IS THE YELLOW CRIMINALISTIC'S ENVELOPE THAT I PLACED THE SUSPECTED COCAINE IN.

Q. AND YOU PLACED BOTH PETITIONER'S 1A INTO IT AND THEN SOME OTHER ROCK COCAINE, SUSPECTED ROCK COCAINE THAT YOU FOUND?

A. YES.

Q. AND DID YOU SEAL THAT ENVELOPE?

A. YES, I DID.

Q. DIRECTING YOUR ATTENTION TO THE BACK, ARE YOUR SEALS STILL INTACT?

A. YES.

Q. AND DID YOU TURN THAT ENVELOPE IN ANYWHERE?

A. YES.

Q. TO THE CRIMINALISTIC SECTION AT THE OAKLAND POLICE DEPARTMENT.

Q. BETWEEN THE TIME YOU SEALED IT AND THE TIME THAT YOU TURNED IT IN, WAS IT IN YOUR POSSESSION THAT NIGHT?

A. YES.

Q. DID YOU RECEIVE ANYTHING ELSE FROM OFFICER PERTOSO?

A. YES.

Q. WHAT?

A. I RECEIVED $130 IN CASH AND A BEEPER.

Q. WHAT DID YOU DO WITH THE $130

IN CASH?

A. IT WAS TURNED INTO THE PROPERTY SECTION AT THE OAKLAND POLICE DEPARTMENT.

Q. HANDING YOU WHAT HAS BEEN MARKED AS PETITIONER'S NUMBER 3, DO YOU RECOGNIZE THAT?

A. YES.

Q. WHAT IS THAT?

A. THIS IS A MONEY ENVELOPE AND INSIDE IS WHAT I PLACED THE – INSIDE IT I PLACED THE CURRENCY THAT WAS RECOVERED FROM THE DEFENDANT.

Q. AND HANDING YOU THE CONTENTS, THE CURRENCY, DO YOU RECOGNIZE THAT?

A. YES.

Q. AND WHAT DOES THAT APPEAR TO BE?

A. IT'S CASH. U.S. CURRENCY.

Q. AND DOES THAT APPEAR TO BE THE CURRENCY THAT YOU PLACED IN IT AFTER OFFICER PERTOSO GAVE IT TO YOU ON APRIL 18TH?

A. YES.

Q. AND DID YOU BRING THAT TO COURT YESTERDAY?

A. YES, I DID.

Q. WAS IT IN A SEALED CONDITION WHEN YOU BROUGHT IT TO COURT?

A. YES.

Q. HANDING YOU PETITIONER'S 2, DO YOU RECOGNIZE THAT?

A YES.

Q. WHAT IS THAT?

A. THIS IS A PROPERTY ENVELOPE AND THIS IS WHAT I PLACED THE PAGER IN THAT WAS RECOVERED FROM MR. DULAN.

Q. HANDING YOU 2A, DO YOU RECOGNIZE THAT?

A. YES.

Q. WHAT IS THAT?

A. IT'S A PAGER AND IT APPEARS TO BE THE SAME PAGER THAT I RECOVERED, WAS RECOVERED FROM MR. DULAN.

MS. KENFIELD: NO FURTHER -- ONE FURTHER.

Q. WHEN YOU TOOK PETITIONER'S 1 AND ITS CONTENTS AT THE END OF YOUR SHIFT, WHERE DID YOU PUT IT?

A. IN A LOCKED BOX.

Q. THAT WOULD BE THE LOCKED EVIDENCE DEPOSITORY BOX AT THE OAKLAND POLICE DEPARTMENT CRIME LAB?

A. YES.

MS. KENFIELD: THANK YOU. NO FURTHER QUESTIONS.

THE COURT: CROSS?

MS. BRICKLEY: NO QUESTIONS.

THE COURT: MAY THE WITNESS BE EXCUSED?

MS. KENFIELD: YES.

THE COURT: THE WITNESS IS EXCUSED.

(WHEREUPON, THE WITNESS IS EXCUSED.)

MS. KENFIELD: YOUR HONOR, I WOULD NOW OFFER THE FOLLOWING STIPULATION: THAT IF CALLED, LANSING J. LEE WOULD QUALIFY AS A CRIMINALIST CAPABLE OF ANALYZING SUSPECTED CONTROLLED SUBSTANCES AND GIVING HIS OPINION AS TO WHAT THEY ARE;

THAT ON MAY 9TH, 1988, HE RECEIVED PETITIONER'S NUMBER 1 FROM OAKLAND POLICE DEPARTMENT EVIDENCE DEPOSITORY IN A SEALED CONDITION; THAT HE OPENED PETITIONER'S NUMBER 1 AND FOUND IT TO CONTAIN A SMALL ZIP-LOCK PLASTIC BAGGIE WHICH HAS BEEN MARKED PETITIONER'S 1A. HE ALSO FOUND IT TO CONTAIN ONE KNOTTED PLASTIC BAG CONTAINING WHITE CHUNKY MATERIAL AND SMALLER ZIP-LOCK BAGS, EACH CONTAINING WHITE CHUNKY MATERIAL, WHICH HAS BEEN MARKED PETITIONER'S 1B;

THAT HE ANALYZED PETITIONER'S 1A AND IDENTIFIED IT AS CONTAINING COCAINE BASE AS IN HEALTH AND SAFETY CODE SECTION 11054(f)(1) AND FOUND THAT MATERIAL TO WEIGH .60 GRAMS. HE THEN RE-PACKAGED, RE-SEALED THE ITEMS AND PLACED THEM INTO EVIDENCE, PLACED THEM BACK INTO THE OAKLAND POLICE DEPARTMENT NARCOTICS LAB.

THE COURT: IS THAT STIPULATION ACCEPTED?

MS. BRICKLEY: YES, IT IS.

THE COURT: THE RECORD WILL SO SHOW.

MS. KENFIELD: PETITIONER WOULD MOVE 1 AND 1A INTO EVIDENCE.

THE COURT: ALREADY IN EVIDENCE, AREN'T THEY?

THE CLERK: THEY'RE ALREADY IN EVIDENCE.

THE COURT: IN ANTICIPATION OF THE ADMISSION I THINK IS WHEN YOU MOVED THEM.

MS. KENFIELD: I THOUGHT I HAD ONLY MOVED 2 AND 3-A IN BUT ....

THE COURT: 1 AND 1A ARE ADMITTED IN EVIDENCE.

(PETITIONER'S EXHIBIT NOS. 1 AND 1A WERE ADMITTED INTO EVIDENCE.)

THE COURT: NEXT.

MS. KENFIELD: PETITIONER RESTS.

THE COURT: ALL RIGHT, MISS BRICKLEY.

MS. BRICKLEY: NO EVIDENCE.

THE COURT: ARGUMENT.

MS. KENFIELD: WAIVE OPENING.

THE COURT: ARGUMENT.

MS. BRICKLEY: THE MATTER IS SUBMITTED.

THE COURT: THE COURT IS CONVINCED BEYOND A REASONABLE DOUBT OF THE TRUTH OF THE ALLEGATIONS IN BOTH THE SUBSEQUENT PETITION AS CHARGED AND IN THE SUPPLEMENTAL PETITION, SUPPLEMENTAL PETITION OR AS IT ALLEGES THE COMMISSION OF THE NEW OFFENSE, BOTH BEYOND A REASONABLE DOUBT.

WHAT IS THE RECOMMENDATION OF THE PROBATION DEPARTMENT REGARDING THE CUSTODY OF THIS MINOR PENDING DISPOSITION?

THE COURT OFFICER: WE RECOMMEND DETENTION, YOUR HONOR.

THE COURT: COUNSEL WISH TO BE HEARD?

MS. BRICKLEY: I WOULD SUBMIT THAT MATTER AS WELL.

MS. KENFIELD: SUBMITTED.

THE COURT: THE MINOR WILL REMAIN IN CUSTODY PENDING DISPOSITION. THE MATTER WILL GO OVER TWO WEEKS FOR DISPOSITION TO --

THE CLERK: JUNE 3RD AT 8:45 A.M. ONE MOMENT, YOUR HONOR. JUNE 6TH AT 8:45 A.M.

THE COURT: THE MATTER WILL GO OVER TO JUNE 6TH 8:45 A.M. IN THIS DEPARTMENT FOR HEARING -- STRIKE THAT -- FOR DISPOSITION.

THE MINOR AND HIS PARENT OR PARENTS ARE ORDERED BACK AT THAT TIME, JUNE 6TH AT 8:45.

MS. BRICKLEY: JUST FOR THE COURT'S INFORMATION, HODARI'S MOTHER WAS HERE EARLIER BUT BECAUSE OF HER WORK SCHEDULE SHE WAS UNABLE TO STAY AND SHE'S GOING TO CALL ME TODAY.

THE COURT: VERY GOOD. THANK YOU.

(THEREUPON, THE PROCEEDINGS WERE ADJOURNED FOR THE DAY AND CONTINUED TO JUNE 6, 1988.)

MONDAY, JUNE 6, 1988 8:45 A.M.

---oOo---

THE COURT OFFICER: THIS IS THE MATTER OF HODARI DULAN. THE MINOR IS PRESENT. HE'S REPRESENTED BY MISS KATHY SIEGEL OF THE PUBLIC DEFENDER'S OFFICE.

REPRESENTING THE DISTRICT ATTORNEY'S OFFICE IS MR. HARRY MURPHY.

ALSO PRESENT WITH HODARI IS, ARE YOU HIS MOTHER, MRS. PAULETTE ROBINSON?

THE MINOR'S MOTHER: YES.

THE COURT OFFICER: YOU ARE --

THE MINOR'S SISTER: HIS SISTER.

THE MINOR'S MOTHER: THAT'S MY DAUGHTER, NIARI DULAN.

THE COURT OFFICER: THANK YOU.

THE MATTER'S ON THE CALENDAR FOR DISPOSITION. THE FINDINGS AFTER HEARING WERE TO POSSESSION OF COCAINE AND PROBATION VIOLATION.

THE RECOMMENDATION OF THE PROBATION DEPARTMENT IS THAT THE COURT FIND THAT REASONABLE EFFORTS HAVE BEEN MADE TO PREVENT OR ELIMINATE THE NEED TO REMOVE THE MINOR FROM HIS HOME AND TO MAKE IT POSSIBLE FOR HIM TO RETURN HOME.

WE'RE ASKING THAT THE COURT FIND THAT THE MINOR WAS TRIED ON PROBATION AND FAILED TO REFORM. WE'RE ASKING THAT THE PREVIOUS ORDER, WITH THE EXCEPTION OF ANY PRIOR RESTITUTION OR RESTITUTION FINE ORDERS, BE SET ASIDE AND A NEW ORDER MADE COMMITTING THE MINOR'S CARE, CUSTODY AND CONTROL TO THE PROBATION OFFICER, WITH THE MINOR

TO BE PLACED IN A SUITABLE COUNTY FACILITY WITH LOS CERROS APPROVED FOR PLACEMENT UNDER THE STANDARD OUT OF HOME PROBATION CONDITIONS.

WE'D ALSO ASK IN THIS CASE FOR THE DRUG CONDITIONS WHICH WOULD BE THAT HE MAINTAIN A 10:00 P.M. CURFEW WHEN IN THE COMMUNITY UNLESS GIVEN PERMISSION BY HIS MOTHER AND THE PROBATION OFFICER IN ADVANCE TO REMAIN OUT LATER.

WE'RE ASKING THAT HE BE ORDERED TO SUBMIT TO DRUG TESTING IF DIRECTED TO DO SO BY THE PROBATION OFFICER; THAT HE BE ORDERED NOT TO ASSOCIATE WITH ANYONE HE KNOWS TO USE, DEAL OR POSSESS ILLEGAL DRUGS; THAT HE NOT HAVE IN HIS POSSESSION ANY BEEPER OR TELEPHONE PAGER; IN ADDITION TO HAVE NO DRUGS AND SEARCH ARE THE STANDARD OUT OF HOME PROBATION CONDITIONS.

WE'RE ALSO RECOMMENDING A RESTITUTION FINE OF $25 -- EXCUSE ME -- $130, AND THAT THE MONEY BE RELEASED FROM -- THAT THE MONEY BE RELEASED TO THE PROBATION OFFICER. I HAVE NOT -- I DON'T' KNOW IF IT'S IN EVIDENCE OR IF IT'S STILL BEING HELD BY THE POLICE DEPARTMENT. WE'D ASK THAT OF THAT MONEY $25 BE A RESTITUTION FINE AND $105 A FINE TO THE GENERAL FUND.

THE COURT: THE RECOMMENDATION THEN IS A 25 DOLLAR RESTITUTION FINE AND 105 DOLLAR GENERAL FINE?

THE COURT OFFICER: YES.

THE COURT: THE COURT HAS REVIEWED THIS REPORT AND IS INCLINED TO ADOPT THE RECOMMENDATION AS STATED BY THE COURT OFFICER. THAT INCLINATION IS SUBJECT TO THE VIEWS OF COUNSEL. COUNSEL WISH TO BE HEARD?

MS. SIEGEL: HODARI, IS THERE ANYTHING THAT YOU WANT TO SAY TO THE JUDGE AT THIS POINT ABOUT THE RECOMMENDATION?

THE MINOR: THE RECOMMENDATION OF LOS CERROS?

MS. SIEGEL: YES.

THE MINOR: I WANTED TO KNOW IF I COULD GO TO CHABOT INSTEAD OF LOS CERROS.

THE COURT: HOW OLD ARE YOU?

THE MINOR: IF THERE WAS A CHANCE.

THE COURT: HOW OLD ARE YOU?

THE MINOR: 17 NOW.

THE COURT: YOU'RE OF THE AGE WHERE WE SEND YOU WITH THE OLDER BOYS. CHABOT IS FOR THE YOUNGSTERS WHO ARE UNDER 16.

MS. SIEGEL: MA'AM, IS THERE ANYTHING THAT YOU WANTED TO SAY TO THE COURT?

THE MINOR'S MOTHER: NO.

MS. SIEGEL: I WOULD SUBMIT IT, YOUR HONOR.

THE COURT: IS THE MATTER SUBMITTED?

MR. MURPHY: YES.

THE COURT: THE COURT ADOPTS AS ITS OWN EACH OF THE FINDINGS AS WERE JUST RECOMMENDED BY THE PROBATION OFFICER.

THIS MINOR IS CONTINUED AS A

WARD OF THE COURT UNDER EACH ONE OF THE CONDITIONS AS WAS JUST STATED BY THE COURT OFFICER.

AND THE COURT CLERK IS ORDERED TO RELEASE THE $130 WHICH WAS CONFISCATED FROM THE MINOR AND IS IN EVIDENCE, RELEASE THAT TO THE PROBATION OFFICER FOR APPLICATION TO THE RESTITUTION FINE AND THE GENERAL FINE AS ORDERED BY THE COURT.

THE MAXIMUM TIME THAT HE MAY BE HELD IN CUSTODY IS, MR. D.A.?

MR. MURPHY: SORRY. THREE YEARS AND -- FIVE YEARS, EIGHT MONTHS MAXIMUM.

THE CLERK: FIVE YEARS, EIGHT MONTHS.

THE COURT: THAT'S THE MAX. I'M SENDING YOU TO CAMP. I'M NOT SENDING YOU TO Y.A. IF I WERE SENDING YOU TO Y.A. YOU WOULD BE LOOKING AT A SUBSTANTIAL PART OF THAT FIVE YEARS, EIGHT MONTHS.

THE CAMP PROGRAM AVERAGE IS ABOUT SIX MONTHS. AFTER YOU'VE BEEN IN IT FOR FOUR TO SIX WEEKS YOU CAN START, IF YOUR CONDUCT IS APPROPRIATE, START EARNING YOUR RIGHT TO SPEND YOUR WEEKENDS AT HOME, BUT YOU'VE GOT TO EARN THOSE EVERY WEEKEND.

ALL RIGHT. THAT WILL BE THE ORDER.

AND THE MATTER WILL GO OVER TWO WEEKS FOR PLACEMENT REVIEW TO --

THE CLERK: JUNE 20TH AT 8:45.

THE COURT: IT IS SO ORDERED. THE COURT FINDS THE 11350 WAS A STIPULATION. WAS THE 777 CONTESTED?

MS. SIEGEL: YOUR HONOR, THERE WAS A 700.1 ON THE 19TH AND THAT WAS DENIED. AND THEN MY FILE INDICATES THAT ON THE 20TH THERE WAS A FINDING OF 11350 AND 777(a).

MR. MURPHY: THE 777(a) WAS AN 11352.

THE COURT: APPARENTLY THIS WAS NOT A STIPULATION.

ALL RIGHT, HODARI, YOU HAVE THE RIGHT TO APPEAL THIS MATTER IF YOU WISH. DO YOU UNDERSTAND WHAT IS MEANT WHEN I TELL YOU THAT YOU HAVE THE RIGHT TO APPEAL?

THE MINOR: YES.

THE COURT: ALL RIGHT. YOU UNDERSTAND THAT YOU'RE NOT REQUIRED TO APPEAL BUT YOU HAVE THE RIGHT TO DO SO IF YOU WANT TO?

IF YOU DO WANT TO APPEAL YOU MUST FIRST FILE A WRITTEN NOTICE OF APPEAL WITH THE COURT WITHIN 60 DAYS OF TODAY. IF YOU DON'T WANT TO APPEAL YOU DON'T HAVE TO FILE ANYTHING.

IF YOU WANT TO APPEAL AND WANT TO BE REPRESENTED BY A LAWYER ON THE APPEAL BUT CAN'T GET A LAWYER BECAUSE YOU DON'T HAVE ENOUGH MONEY TO HIRE ONE, YOU TELL THAT TO THE COURT IN WRITING, AND IF THE COURT FINDS IT TO BE TRUE, THE COURT WILL THEN APPOINT A LAWYER TO REPRESENT YOU ON THE APPEAL AND YOU WON'T HAVE TO PAY THAT LAWYER YOURSELF.

DO YOU UNDERSTAND THAT?

THE MINOR: YES.

THE COURT: ALL RIGHT. THE ORDER WILL BE AS STATED.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

---oOo---

HODARI DULAN - 141401*02 05/19/88 25 90

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ALAMEDA - JUVENILE COURT

WILMONT SWEENEY, JUDGE DEPT.: 25
LOUISE R. MORIEGA, CLERK DATE : 05/19/88
FANCINA KIDD, COURT REPORTER
COURT OFFICER: EWING/MARQUART
PROBATION OFFICER: SIMMS

IN THE MATTER OF: ORDER (602 W&I CODE)

HODARI DULAN, A MINOR
BORN: 06/05/71 NUMBER: 141401

PARTIES PRESENT: MINOR; MOTHER.
COURT ATTACHES: DDA AN KENFIELD; APD JANICE BRICKLEY, CNSL FOR MINOR

THE MATTER COMES BEFORE THE COURT FOR: FURTHER HEARING ON 700.1 MOTION AND ON SUB & SUPPL PETNS FILED 04/20/88 CONTINUED FROM 05/12/88. CT 1 11350 H&S-F STILL PENDING; CT SUPPLE 777A W&I-M STILL PENDING.

COUNSEL'S POINTS AND AUTHORITIES ARE RECEIVED AND REVIEWED.

MINOR'S 700.1 MOTION IS ARGUED AND SUBMITTED.

EXHIBITS MARKED FOR IDENTIFICATION OR ADMITTED INTO EVIDENCE ARE LISTED ON THE EXHIBIT RECORD ON FILE HEREIN.
SPECIAL EXHIBITS: PETITIONER'S #1A & 1B=ROCK COCAINE, PETITIONER'S #3-US CURRENCY = TOTAL $130.00

THE COURT FINDS THAT:

THE COURT FINDS THAT:

MINOR'S 700.1 MOTION IS DENIED.

THE MINOR IS ORDERED TO RETURN TO THE COURTROOM.

PARENT ORDERED TO RETURN.

CONTINUED TO: 05/20/88 IN DEPARTMENT 25 AT 08:45AM FOR FURTHER HEARING TO BE HEARD AT 10:00AM).

REFEREE JUDGE OF THE JUVENILE COURT

CCS:
( )MINOR ( ) PARENT ( ) CSL
(X)PO ( ) PD ( ) DA
( )DMV

HODARI DULAN - 141401*02 05/20/88 25 89
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA - JUVENILE COURT

WILMONT SWEENEY, JUDGE DEPT: 25
LOUISE R. NORIEGA, CLERK DATE: 05/20/88
FRANCINA KIDD, COURT REPORTER
COURT OFFICER: MARQUART/CORTLUND
PROBATION OFFICER: SIMMS

IN THE MATTER OF: ORDER (602 W&I CODE)

HODARI DULAN, a minor Born: 06/05/71
Number: 141401

Parties present: MINOR.
Court attaches: APD JANICE BRICKLEY, CNSL FOR MINOR; DDA ANN KENFIELD.

THE MATTER COMES BEFORE THE COURT FOR: FURTHER HEARING ON SUB & SUPPL PETNS FILED 04/20/88 - (TO BE HEARD AT 10:00 AM) - CONTINUED FROM 05/19/88. CT 1 11350 H&S-F STILL PENDING; CT SUPPLE 777A W&I-M STILL PENDING.

STIPULATION THAT TESTIMONY ADMITTED INTO EVIDENCE IN RE HEARING ON 700.1 MOTION IS TO BE ADMITTED FOR THE CASE-IN-CHIEF.

WITNESSES SWORN ON BEHALF OF THE PETITIONER IN RE CASE-IN-CHIEF: OFR. JERRY PERTOSO, OAKLAND POLICE DEPARTMENT (RESUMES); OFR. BRIAN MC COLGIN, OAKLAND POLICE DEPARTMENT (RESUMES).

EXHIBITS MARKED FOR IDENTIFICATION OR ADMITTED INTO EVIDENCE ARE LISTED ON THE EXHIBIT RECORD ON FILE HEREIN.

THE COURT FINDS THAT:
(x) NOTICE has been given as required by law; the BIRTHDATE and county of RESIDENCE of minor has been determined.
CT 1 (FM 05/20/88), 11350 H&S-F, TRUE AS ALLEGED; CT SUPPLE (FM 05/20/88), 777A W&I-M, TRUE AS ALLEGED.

THE COURT ORDERS THAT:
Minor is to be detained at Juvenile Hall. (PENDING DISPOSITION)

The minor is ordered to return to the courtroom.

_____

_____

Continued to: 06/06/88 in Department 25 at 08:45 AM for DISPOSITION.

_____
Referee Judge of the Juvenile Court

CCs:
( ) Minor ( ) Parent ( ) CSL
(x) PO ( ) PD ( ) DA
( ) DMV

**FILED ALAMEDA COUNTY JUNE 9, 1988 -
RENE C. DAVIDSON, COUNTY CLERK**

HODARI DULAN - 141401*02 06/06/88 25 25

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA - JUVENILE COURT

WILMONT SWEENEY, JUDGE DEPT: 25
FRANCIS MICHEL, CLERK DATE: 06/06/88
FRANCINA KIDD, COURT REPORTER
COURT OFFICER: KAY EWING
PROBATION OFFICER: SIMMS

IN THE MATTER OF: ORDER (602 W&I CODE)

HODARI DULAN, a minor
Born: 06/05/71 Number: 141401

Parties present: MINOR; MOTHER; SISTER.
Court attaches: APD KATHY SIEGEL; DDA HARRY MURPH.

THE MATTER COMES BEFORE THE COURT FOR: DISPOSITION ON SUB & SUPPL PETNS FILED 04/20/88 CONTINUED FROM 05/20/88. CT 1 (FM 05/20/88) 11350 H&S-F, TRUE AS ALLEGED; CT SUPPLE (FM 05/20/88) 777A W&I-M, TRUE AS ALLEGED.

THE COURT FINDS THAT:

CT 1 (FM 05/20/88), 11350 H&S-F, TRUE AS ALLEGED; CT SUPPLE (FM 05/20/88), 777A W&I-M, TRUE AS ALLEGED.

THE COURT ORDERS THAT:
Minor is continued a ward of the court.
Minor has been tried on probation in the physical custody of a parent or guardian and has failed to reform.
Reasonable efforts have been made to prevent or eliminate the need for removal of the minor from his/her home and to make it possible for the child to return to his/her home and continuance in the home is contrary to the minor's welfare.

Present order is set aside. THE COURT MAKES A NEW ORDER.

Committed to the care, custody and control of the Probation Officer to be placed in a suitable foster home or private institution or group home/county facility WITH LOS CERROS A COUNTY FACILITY APPROVED FOR PLACEMENT.

Additional terms and conditions of probation as subsequently listed are made a part of this order and incorporated herein.

MINOR IS NOT TO USE/POSSESS ANY NARCOTICS, DRUGS, OR OTHER CONTROLLED SUBSTANCES, RELATED PARAPHERNALIA OR POISONS UNLESS PRESCRIBED BY A PHYSICIAN.

MINOR IS NOT TO USE/POSSESS BEEPER (PAGER), OR OTHER REMOTE ELECTRONIC COMMUNICATION DEVICE.

THE MINOR IS NOT TO ASSOCIATE WITH PERSONS HE KNOWS TO USE/POSSESS/DEAL ILLEGAL DRUGS.

MINOR IS TO OBSERVE A CURFEW EVERY NIGHT UNLESS RECEIVING THE PRIOR PERMISSION OF BOTH THE PROBATION OFFICER AND THE PARENT/CUSTODIAN TO STAY OUT LATER.

MINOR TO SUBMIT PERSON VEHICLE PROPERTY UNDER HIS/HE CONTR OR ROOM TO SEARCH BY ROL, OR ROOM TO SEARCH BY A PROBATION OFFICER, POLICE OFFICER OR LAW ENFORCEMENT OFFICIAL WITH OR WITHOUT A SEARCH WARRANT AT ANY TIME OF THE DAY OR NIGHT.

MINOR IS TO SUBMIT TO URINALYSIS OR ANY OTHER TEST FOR USE OF NARCOTICS OR OTHER CONTROLLED SUBSTANCES AS DIRECTED BY THE PROBATION OFFICER.

MINOR IS TO COOPERATE WITH THE PROBATION OFFICER IN ANY PROGRAM OF GUIDANCE COUNSELING OR THERAPY

ADDRESSING THE ISSUE OF SUBSTANCE ABUSE.

Minor pay to the General Fund of Alameda County $105.00

Minor pay to the State Restitution Fund $25.00

Minor advised maximum period of confinement is 5 YEARS AND 8 MONTHS.

THE CLERK IS ORDERED TO RELEASE THE MONIES IN EVIDENCE $135.00 TO THE PROBATION OFFICER, TO BE APPLIED TO THE FINES IMPOSED. ANY PREVIOUS RESTITUTION ORDERS ARE TO REMAIN IN FULL FORCE AND EFFECT.

Minor is advised of right to appeal.

Minor is to be detained at Juvenile Hall.

Continued to: 06/20/88 in Department 25 at 08:45 a.m. for PLACEMENT REVIEW.

Referee Judge of the Juvenile Court

CCs:
( ) Minor ( ) Parent ( ) CSL
(x) PO ( ) PD ( ) DA
( ) DMV

FILED ALAMEDA COUNTY, JUNE 13, 1988
RENE C. DAVIDSON, COUNTY CLERK

SUPERIOR COURT OF THE STATE CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA, IN SESSION AS A JUVENILE COURT

In the matter of

Dept. No. 25

HODARI DULAN,

No. 141401

A Minor.

NOTICE OF APPEAL FROM FINDINGS, JUDGMENT AND DISPOSITIONAL ORDER

_____/

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that Hodari Dulan, appellant, a minor aged 16, in the above-entitled action, hereby appeals to the Court of Appeal of the State of California, in and for the First Appellate District, from the findings, judgment, and dispositional order herein entered in the above-entitled court on the 6th day of June, 1988, and from the whole of said findings judgment and said dispositional order.

DATED: June 6, 1988

_____
Hodari Dulan
Appellant in propria persona

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re HODARI D., a Person Coming Under the Juvenile Court Law.	
PEOPLE OF THE STATE CALIFORNIA, Plaintiff and Respondent, v. HODARI D., Defendant and Appellant.	A043060 (Alameda County Super.Ct.No. 141401)

Hodari D., a minor, appeals from the juvenile court's order finding that he was in possession of cocaine and that he violated the curfew restrictions of his probation. We determine that the court erred in failing to suppress evidence obtained as a direct result of illegal police activity, and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On April 18, 1988, at approximately 10 p.m., Officer McColgin and Pertoso, assigned to a special duty drug task force, were on patrol in the area of Foothill Boulevard and 63rd Avenue in Oakland. They drove an

unmarked brown Dodge, and both officers wore blue jeans, tennis shoes, and blue jackets with the word "police" on the front and back. As the officers turned south onto 63rd Avenue, they saw four or five young Black males standing around a small red compact car parked at the curb approximately 40 yards away. Two members of the group looked at the Dodge and almost immediately started running west toward an apartment complex. The red vehicle drove off quickly and the other two individuals ran south on 63rd Avenue toward an abandoned house next to the apartments.

The officers were familiar with the apartment complex as an area of high narcotic activity in which they had made several arrests. There was no information as to whether any convictions had resulted from the arrests. By the time the officers pulled up to where the red vehicle had been parked, all of the individuals were out of sight. The officers did not see their faces, nor did they see any exchange of drugs, money, or any other furtive movements, but they believed there was "some type of illegal [narcotics-related] activity" taking place.

Officer Pertoso got out of his car and ran back up 63rd Avenue, turning west on Foothill to cut

off the fleeing individuals to "find out who they were and what their purpose was for being there in the area." Officer McColgin drove around the block in the opposite direction, also attempting to stop the individuals. As Pertoso ran westbound along Foothill, he saw appellant running towards him, looking back over his shoulder. Pertoso and appellant continued to run until they were approximately 11 feet apart, when appellant turned forward, saw the officer, and looked startled. Appellant then made a scooping motion with his hand, and discarded a single loose rock on the sidewalk. Pertoso suspected the rock was cocaine.

Pertoso apprehended appellant, forced him to the grass, handcuffed him, and radioed McColgin. McColgin arrived on the scene and retraced the route back to where the officers had originally seen the group. He found a baggie containing 15 chunks of what later proved to be cocaine near the apartment complex.[1/]

On April 20, 1988, a subsequent petition under Welfare and Institutions Code section 602 was filed against appellant alleging possession of cocaine. (Health & Saf. Code, § 11350.) A supplemental

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1. In a search incident to the arrest, police discovered $130 in appellant's shoe and a pager.

petition alleged a curfew violation. (Welf. & Inst. Code, § 777, subd. (a).)

On May 2, 1988, appellant filed a motion to suppress all evidence seized as a result of his detention. (Welf. & Inst. Code § 700.1.) On May 19, the motion was denied. The court subsequently found the allegations of the petitions to be true.

At the dispositional hearing on June 6, appellant was ordered committed to Los Cerros Camp. A timely notice of appeal was filed on June 13, 1988.

DISCUSSION

On appeal, appellant challenges the court's suppression order, arguing that the cocaine should have been suppressed because the chase constituted a detention and the officers had no reasonable cause to detain appellant. Respondent argues that there was no detention until the officers caught appellant, and that absent an illegal police threat to search, as opposed to a threat to detain, appellant's discard of the cocaine is not a result of a threatened illegality.

The trial court's findings and reasoning were not entirely clear. The court stated: "I'm not concerned with the illegality of the chase on these facts. I think this was clearly illegal. The cops had no

reasonable basis for doing what they did in chasing him."[2/] The court's concern was with the issue of whether, granting the initial illegality, "[A]m I required to find that anything that was disposed of . . . that's suppressible?" The trial court found it illogical that discarded evidence should be suppressed, even though the court felt that the evidence would have been suppressed if appellant left it in his pocket and the police discovered it during a search following appellant's apprehension. It appears that the court's main concern was with the nexus between the illegality and the evidence, rather than the issue of whether there was illegal police conduct. We approach the issue as a three-part inquiry into whether a detention occurred, if there was reasonable cause for detention, and whether

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2. The trial court noted that there was no "actual detention" until after appellant discarded the rock. The court was distinguishing between threatened detentions and actual, physical detentions. The court also stated, however, that the police had no right to chase appellant or to detain him. Under the facts of this case, as compared to cases in which an officer merely follows a suspect, we find there was an actual detention, for Fourth Amendment purposes, when the officer confronted appellant head on at a run, as at that point, the officer communicate an intent to capture or block appellant's freedom of movement. (Michigan v. Chesternut (1988) 486 U.S. ___, ___ [108 S.Ct. 1975, 1980].)

abandonment of the evidence was a direct result of an illegal detention.

Was There a Detention?

We apply federal law, but utilize state law where it does not conflict with federal law in evaluating the issues involved. (In re Lance W. (1985) 37 Cal.3d 873.) In reviewing a motion to suppress, we accept the factual finding of the trial court which are supported by substantial evidence, but we independently determine whether the facts conform to the constitutional standards of reasonableness. (People v. Leyba (1981) 29 Cal.3d 591, 596-597.) Since only the police officers testified in this case, the facts are undisputed.

Both parties correctly cite Michigan v. Chesternut, supra, 486 U.S. ___ [108 S.Ct. 1975] as the most recent Supreme Court case analyzing when police conduct constitutes a detention. In Chesternut, officers in a patrol car observed a man get out of a car and approach the defendant. When defendant saw the officers, he turned and ran. The patrol car followed, "'to see where he was going.'" As the car drove alongside, defendant discarded several packets containing codeine. (Id., 108 S.Ct. at p. 1977.)

The court noted it would "leave to another

day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980, fn. 9.) The court also declined to adopt a rule that "a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." (Id., at p. 1979.) Instead, the court reaffirmed the test of United States v. Mendenhall (1980) 446 U.S. 544, that "the police can be said to have seized an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' [Citations]." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1979.) The test is designed to "assess the coercive effect of police conduct, taken as a whole, ..." (Ibid.)

In evaluating the facts of Chesternut, the Supreme Court noted that the police conduct in that case "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980.) There was no use of siren or flashers, no command to halt, and no

operation of the police car to block the suspect's course, "or otherwise control the direction or speed of his movement." (Ibid.) The court also noted that mere surveillance or approach by an officer is not a seizure. (Id., at pp. 1980-1981.) The court left open the question of when police pursuit would constitute a seizure. (Id., at p. 1980, fn. 9.)

In the instant case, appellant alludes to the coercive nature of the police action of engaging in an aggressive foot chase to cut off his flight and of sending an officer in each direction. Of course, appellant had disappeared by the time Officer Pertoso got out of the car, and thus had no knowledge of this police pincer maneuver. In fact, appellant never saw Officer McColgin until after he was under arrest. Police conduct of which the suspect is unaware is not relevant to a Fourth Amendment analysis. (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980, fn. 7.) The only police conduct with which we are concerned in the instant case is that of Officer Pertoso as he ran up Foothill Boulevard toward appellant, from the time appellant, who was also running, looked forward and saw the officer running directly at him.

We have no doubt that it is coercive and

intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk. Indeed, the sight of a running officer, even without a command to halt, would reasonably convince most citizens that they were not free to ignore the officer and leave. We disagree with the trial court that there was no detention until the officer physically gained control of the suspect. This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion as to cut him off and confront him head on. Under the rationale of Chesternut, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or "otherwise control the direction or speed" of one's movement. (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980.)

California cases and federal cases have held that giving chase "in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention." (People v. Washington (1987) 192 Cal.App.3d 1120, 1126; People v. Menifee (1979) 100 Cal.App.3d 235, 239 [officer's rapid pursuit of suspects who knew the officers could be reasonably viewed as an intended detention]; United States v. Bowles (5th Cir.

1980) 625 F.2d 526, 532 [officer in pursuit of suspect who passes him, turns to face him and holds out credentials has restrained the suspect].) A citizen has the right to leave at the approach of police, and when the officer takes action to prevent a citizen's exit, the officer has restrained the citizen's freedom of movement. (People v. Washington, supra, 192 Cal.App.3d 1120, 1125-1126.)

Respondent contends that by its citation of Hester v. United States (1924) 265 U.S. 57 in Brower v. County of Inyo (1989) 489 U.S. ___ [109 S.Ct. 1378], a civil rights case, the Supreme Court has adopted the suggestion of two justices in Chesternut that there can be no detention until a fleeing suspect is actually caught.3/ (Michigan v. Chesternut, supra, 108 S.Ct. 1975,

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3. The language referred to in Chesternut is: "It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1981.) If this statement refers to a requirement of physical restraint, it would be contrary to many years of Supreme Court precedent stating that no physical restraint is necessary to constitute a detention. (Adams v. Williams (1972) 407 U.S. 143, 146 [involuntary rolling down of vehicle window in response to officer's request denoted a "forcible stop"]; Terry v. Ohio (1967)

1081, Kennedy J., concurring, joined by Scalia, J.) We do not find that conclusion is compelled by Brower. In Hester, defendant and an accomplice were under surveillance as a result of an informant's tip. Officers saw the accomplice hand defendant a quart bottle, at which point the court stated: "An alarm was given." (Hester v. United States, supra, 265 U.S. 57, 58.) Defendant grabbed a gallon jug and fled with the accomplice. An officer pursued, and the two men dropped the bottles, which the officers recognized as containing illegal whiskey. It appears from these facts that the officers in Hester had at least a reasonable suspicion, having lawfully witnessed the transaction with the bottles, which would have justified a detention prior to defendant's flight. The case has no application to illegal detentions, nor does it purport to define what constitutes a detention, but merely states that there was no seizure when the officers inspected the bottles.

The Brower court's purpose in citing Hester was to illustrate its statement that the term "seizure" could not be applied to an unknowing act, but must be

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392 U.S. 1, 19, fn. 16 ["[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."].)

the result of government means "intentionally applied." (Brower v. County of Inyo, supra, 109 S.Ct. 1378, 1381.) The court was considering a case in which a fleeing suspect had been killed when his car crashed into a police roadblock. The lower court had concluded that the death was caused by the suspect's voluntary act of failing to stop. The Supreme Court stated that this "decision to continue the chase" could not eliminate the county's responsibility for termination of his movement. (Id., at p. 1380.) The court concluded that use of the roadblock to stop the car was a seizure. We find no application to the instant case, and no requirement of physical restraint prior to a finding that a detention has occurred.[4] We conclude, on the facts of this case, that there was a detention, and that the detention began as soon as appellant saw the officer running toward him.

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4. Even if physical seizure were required, we believe that the facts of the instant case illustrate a situation tantamount to a physical seizure. Appellant, who was running down the sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a jacket marked "police," who was 11 feet away and running toward him.

Reasonable Cause to Detain

The trial court concluded that the police had no reasonable cause to detain appellant prior to his discard of the drugs. Respondent does not dispute the trial court's finding that the police had no reasonable cause to chase or detain appellant, choosing to rest on the argument that there was no detention. The trial court's decision on this issue is supported by the law.

Initially, we note that the fact of appellant's flight at the sight of the officers is sometimes relevant in assessing the existence of an officer's reasonable suspicion, where, as here, the flight is not triggered by an illegal act on the part of the officer. (3 LaFave, Search and Seizure (2d Ed. 1987) § 9.3(c), p. 449, fn. 150, citing Commonwealth v. Thibeau (1981) 429 N.E.2d 1009.) Flight alone, however, is insufficient to justify a detention. (People v. Aldridge (1984) 35 Cal.3d 473, 478.) "If the right to be free from unjustified detention is lost merely by seeking to avoid such encounters, then the right is meaningless; it would exist only to the extent it was not exercised." (People v. Bower (1979) 24 Cal.3d 638, 649 [fact that appellant, white, observed by police with a group of blacks, started moving hurriedly away raises no inference of criminal activity]; Wong Sun

v. United States (1963) 371 U.S. 471, 482-483 [suspect's flight from narcotics officer at door does not justify otherwise illegal police action].) Flight coupled with other "specific knowledge on the part of the officer relating the suspect to the evidence of crime" may be considered in assessing an officer's actions. (Sibron v. New York (1968) 392 U.S. 40, 66-67.) Thus, the fact that appellant ran away can support a detention only when coupled with other specific knowledge.

The only other factor known to the officers in the instant case at the time was that the address where the red car was parked was an area of high narcotic activity. The hour (10:30 p.m.) was not unusually late; the officers observed no exchange of drugs or money; there was no Vehicle Code violation observed; and the officers did not recognize any of the people standing near the car. The factors of nighttime, high drug activity in the area, and seeking to avoid police were held insufficient to justify a detention in People v. Aldridge, supra, 35 Cal.3d 473, 478. We must conclude that the facts known to the officers in the instant case at the time they began to chase appellant, and when appellant became aware of the effort to stop him, did not constitute "'. . . specific and articulable facts causing

[the officers] to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person [the officers] intend[] to stop or detain is involved in that activity. . . .'" (People v. Aldridge, supra, 35 Cal.3d 473, 478; In re Tony C. (1978) 21 Cal.3d 888, 893.)

Link Between Abandonment of the Cocaine and the Illegality

Finding that appellant was detained without a reasonable suspicion of criminal activity does not end our inquiry. Not all evidence obtained through illegal police action must be excluded. (Wong Sun v. United States, supra, 371 U.S. 471, 487-488.) The test is not whether the evidence would have come to light but for the illegality, but if the evidence was obtained as a direct result, or exploitation of the illegality. If the evidence was obtained by sufficiently independent means, or an intervening independent act of the defendant, the "taint" of illegality is said to have been purged. (Ibid; People v. Lee (1986) 186 Cal.App.3d 743, 751.)

Respondent argues that appellant failed to show a nexus between the police action and the evidence, as there was no showing that the police

intended to search him as opposed to merely detaining him. Respondent disputes our analysis in People v. Menifee, supra, 100 Cal.App.3d 235, and the holding in People v. Washington, supra, 192 Cal.App.3d 1120, and cites two opposing cases as the correct analysis of the nexus requirement. (People v. Patrick (1982) 135 Cal.App.3d 290; People v. Holloway (1985) 176 Cal.App.3d 150.) The latter two cases conclude that absent a police threat of an illegal search, evidence that is abandoned by a fleeing suspect is the product of a voluntary act rather than a product of an illegal detention. We cannot agree that the illegality involved must be a search in order for discovered evidence to be suppressed as a direct result or exploitation of the illegality.

"[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation -- whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the curse of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." (United States v. Crews (1980) 445 U.S. 463, 470, fns. omitted.) Factors to be considered in determining whether evidence is a product

of police illegality include whether the evidence was obtained as a product of the defendant's free will, the temporal proximity of the illegality to the discovery of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. (Brown v. Illinois (1975) 422 U.S. 590, 603-604 [considering whether a confession was obtained by exploitation of an illegal arrest].) None of these factors require a showing of an illegal search as the triggering illegality, as opposed to an illegal arrest or detention.

Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer's stated purpose in pursuing appellant was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's acts were unfounded, as he admitted he originally saw nothing suspicious other than the four Black youths standing near a car. Appellant's act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence. (United States v. Pirolli (11th Cir. 1982) 673 F.2d 1200, 1204

[abandonment that is the product of police misconduct is not voluntary]; United States v. Beck (5th Cir. 1979) 602 F.2d 726, 730 [throwing marijuana out car window not voluntary abandonment after officer had pulled police car in front of defendant's parked vehicle].) To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction.

The purpose of the exclusionary rule to deter illegal police conduct is served by our decision. "Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such Fourth Amendment violations in future cases." (4 LaFave, Search and Seizure, op. cit. supra, § 11.4(j), pp. 459-460.) If the police had no legal ground to obstruct appellant's path, exclusion of the evidence obtained as a direct result of that action serves to deter the repetition of such unfounded detentions.

We adhere to the analysis mandated by Wong Sun, Crews, and Brown, and determine that the challenged evidence was obtained as a direct result of the

illegal detention. The trial court erred in ruling that the evidence was admissible in the action below.

The order appealed from is reversed.

CERTIFIED FOR PUBLICATION

Racanelli, P.J.

We concur:

Nesom, J.

Stein, J.

Trial Court: Superior Court, County of Alameda

Trial Judge: Hon. Wilmont Sweeney

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AO43060
In re Hodari D.

FILED December 15, 1989
Court of Appeal - First App. Dist.
Ron D. Barrow, Court Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division One, No. A043060
S013842

IN THE SUPREME COURT OF STATE OF CALIFORNIA

IN BANK

In Re HODARI D., A Person Coming Under the Juvenile Court Law

THE PEOPLE, Respondent

v.

HODARI D., Appellant

Respondent's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed December 15, 1989, which appears at 216 Cal.App.3d 745. (Cal. Const., Art.VI, Section 14; Rule 976, CAl. Rules of Court.)

LUCAS
CHIEF JUSTICE

SUPREME COURT
Filed March 15, 1990
Robert Wandruff, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 1, 1990

Re: California v. Hodari D.
No. 89-1632

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.

No. 89-1632

SUPREME COURT, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether a person who is not under the physical control of a police officer has been "seized" under the Fourth Amendment.
2. Whether a person who is pursued by a police officer on a public street may avoid prosecution by discarding incriminating evidence and asserting that he did so out of fear of an unlawful search despite the absence of any evidence that the officer intended to conduct such a search.

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No. 89-1632

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

HODARI D.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, originally reported at 216 Cal.App.3d 745, 265 Cal.Rptr. 79 (1989), was withdrawn from publication by order of the California Supreme Court on March 15, 1990. A copy of the opinion appears in the Joint Appendix at J.A. 126-145. The California Supreme Court denied review in this matter on March 15, 1990. A copy of the order of denial appears in the Joint Appendix at J.A. 146.

JURISDICTION

The opinion of the California Court of Appeal was filed on December 15, 1989. The California Supreme Court denied review on March 15, 1990, at which time the opinion of the court of appeal became final and reviewable by this Court. California Rules of Court, rules 24(a), 25(a), 28(f). A petition for writ of certiorari was timely filed on April 18, 1990, within 90 days of the denial of review by the state supreme court. Supreme Court Rules, rule 13.1. On October 1, 1990, this Court granted certiorari. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT

1. About 10:00 p.m. on April 18, 1988, Officers Brian McColgin and Jerry Pertoso of the Oakland Police Department were on routine vehicular patrol, driving westbound on Foothill Boulevard. Assigned to a special duty drug task force, they drove an unmarked brown Dodge and wore blue jeans, tennis shoes, and blue jackets bearing the word "police" on the front and back. (J.A. 26.) As the officers turned south onto 63rd Avenue, they saw 4 or 5 young black men standing around a small red compact car parked on the west side of the street in front of 2663-63rd Avenue. The address was known to the officers as "an area of high narcotics activity where [the officers] have participated in several narcotic related arrests." (J.A. 28.) When one or more of the youths saw the officers' vehicle turning the corner, about 40 yards

away (J.A. 39), they immediately fled. Two of the youths ran southward on 63rd Avenue and then turned west toward the apartment complex at 2663-63rd Avenue; two others ran west to the rear of an abandoned house at 2665-63rd Avenue. (J.A. 28.) Officer McColgin did not recognize any of them. (J.A. 35.) The red car "proceeded southbound at a high rate of speed after the others ran." (J.A. 39.)

Officer McColgin drove the patrol unit to the curb where the red car had been parked. Officer Pertoso left the car, ran north on 63rd Avenue to Foothill Boulevard, turned west and continued running. (J.A. 40-41.) When Officer Pertoso left the car, "all of the individuals were out of sight." (J.A. 41.) Meanwhile, Officer McColgin drove south on 63rd Avenue, west on Bancroft Street, and north on 62nd Avenue looking for the youths. (J.A. 29.)

The reason for the officers' pursuit was that "we believed that there was some type of illegal [narcotics-related] activity occurring there" and "[w]e wanted to stop the individuals who had run and find out who they were and what their purpose was for being there in the area." (J.A. 29.)

As Officer Pertoso ran west on Foothill Boulevard, he saw respondent Hodari D. "running northbound [on 62nd Avenue] toward me but he was looking over his shoulder as if to be looking for someone to follow him." (J.A. 41.) When respondent turned his head and saw the officer, "he had a startled look on his face." (J.A. 46.) Standing about 11 feet from Officer Pertoso, appellant, "in an underhand scooping motion with the right hand," "discarded a single loose rock to the sidewalk along the side of the house." (J.A. 41-42.) At that point the officer

had not said or done anything other than "to be where he was." (J.A. 42.)

After appellant threw the rock to the ground, "he continued towards me." (J.A. 42.) Suspecting that the rock was cocaine, Officer Pertoso "forced [appellant] to the grass and handcuffed him." (J.A. 42.)

Officer Pertoso alerted Officer McColgin by radio that he was detaining a person in one of the yards. McColgin drove to the place where Pertoso had apprehended respondent and then retraced the route which respondent presumably had taken. He found a plastic sandwich bag containing approximately 15 rocks of suspected cocaine on the bottom stair of the house at 2663-63rd Avenue. (J.A. 31.)

It was stipulated that the rock discarded by respondent and those found in the plastic baggie contained cocaine. (J.A. 109.)

Officer Pertoso searched respondent and found $130 and a pager on his person. (J.A. 106.)

2. On April 20, 1988, the District Attorney filed a petition in Alameda County Juvenile Court, alleging that respondent came within the provisions of California Welfare and Institutions Code section 602, in that he possessed cocaine, in violation of California Health and Safety Code section 11350. (J.A. 1-2.) On May 2, 1988, respondent moved under Welfare and Institutions Code section 700.1 to suppress all evidence seized as a result of his detention. (J.A. 3-17.) The juvenile court denied the motion on May 19, 1988. (J.A. 93, 118.) On May 20, the court held the jurisdictional hearing and found true the

allegation that respondent possessed cocaine. (J.A. 110, 120.) On June 6, 1988, the court continued a previous wardship and ordered that respondent be committed to a county facility for a period not to exceed 68 months. (J.A. 114-115, 122.)

3. On December 15, 1989, the California Court of Appeal, First Appellate District, reversed the judgment of wardship, ruling that respondent had been unlawfully detained and that the evidence was discovered as a result of the detention. (J.A. 126-145.) On March 15, 1990, the California Supreme Court denied review. (J.A. 146.)

SUMMARY OF ARGUMENT

This case presents a factual scenario which occurs almost daily in the Nation's cities. A youth, sensing a police presence on the street, runs away. The police,

curious about the reasons for the flight, follow him. Fearing detention and search, the youth throws away incriminating evidence, often narcotics, hoping the police will not find it. But the officer picks up the contraband and arrests the youth. Thus completes the familiar sequence of recognition, flight, chase, abandonment, and apprehension.

In reversing the judgment of wardship against respondent, the California Court of Appeal held: (1) A police officer who runs after, or toward, a citizen on the street has effected a detention although physical control of the person is never acquired; (2) the act of running from police officers who had done nothing to provoke flight is insufficient cause for pursuit; (3) incriminating evidence abandoned in the face of police pursuit is the fruit of the poisonous tree. The court of appeal thus declared that a

police officer may not lawfully pursue -- or even run toward -- a citizen without specific cause to believe that he has committed a crime; if the officer does, the citizen may avoid prosecution by openly discarding anything in his possession, whether it is marijuana, cocaine, or a knife or gun. This view of the Fourth Amendment has given criminals an unjustified and preemptive form of protection and has taken from police a necessary means of investigating suspicious behavior.

The opinion of the court of appeal rests upon at least two fundamental misconceptions, either of which requires reversal of its judgment. First, when a person flees from the lawful presence of the police, the fugitive is not detained until the officer, by a show of authority or physical force, has terminated the freedom of movement or otherwise acquired physical control of that person. In

this case, respondent's unprovoked flight prompted reasonable police pursuit. When the officer, in an effort to intercept respondent, encountered him on the other side of the block from the initial sighting, respondent could not have known that the officer was pursuing him. A police officer's act of running on the street does not alone constitute a show of authority which detains, as a matter of law, every person in his path. In addition, when respondent threw away his cocaine, he was not under the physical control of the officer and therefore was not seized under the Fourth Amendment.

The state court also erred in concluding that because respondent was unlawfully seized, the contraband which he discarded was fruit of the poisonous tree. Under such circumstances, absent an official demand for disclosure or other manifestation of intent to search, the detainee's

attempt to discard or hide any incriminating evidence attentuates the connection between the prior illegality and the subsequent recovery of the evidence. The deterrent purpose of the exclusionary rule is not served by the suppression of evidence which was not sought by police but was, instead, voluntarily produced by respondent. That purpose is adequately satisfied by the traditional remedy of suppression of any evidence which the officer discovered by a search or ordered produced. The Fourth Amendment, which does not speak of "attempted" searches, does not require alternative remedies. In this case, the officer did not manifest an attempt to search respondent, who must accept sole responsibility for his decision to expose the cocaine.

ARGUMENT

I.

RESPONDENT, WHO NEITHER ACQUIESCED IN A SHOW OF AUTHORITY NOR WAS PHYSICALLY RESTRAINED BY POLICE OFFICERS, WAS NOT SEIZED UNDER THE FOURTH AMENDMENT.

In concluding that respondent had been seized when he produced his rock of cocaine, the court of appeal reasoned that a person who saw a police officer running toward him on the street would reasonably believe that he was not free to leave. The court rejected the argument that physical restraint was an element of a Fourth Amendment seizure but, in any event, found that the officer's actions were "tantamount" to a physical seizure. The state court's holding is unsound for several reasons. First, a person who flees from the lawful presence of police is not "seized" in any meaningful or constitutional sense of that word. A seizure by the police requires the purposeful termination of a citizen's freedom of movement, either by the use of force or by the display

of authority in which he has acquiesced. Respondent, whose unprovoked flight prompted police pursuit, was not seized when he dropped the rock of cocaine because there was (1) no assertion of authority which would have led a person reasonably to believe that he was not free to leave; (2) no acquiescence in any display of authority; and (3) no physical control over his movement.

A. A Seizure Requires An Official Act and A Restraint Upon Liberty.

We begin by defining the concept of "seizure" within the meaning of the Fourth Amendment. This Court has stated repeatedly that "[o]nly when the officer, by means of *physical force or show of authority*, has *restrained the liberty* of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968) (emphasis added); *accord, Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988); *INS* v. *Delgado*, 466 U.S. 210, 215 (1984); *United States* v. *Mendenhall*, 446 U.S. 544, 552 (1980) (Opinion of Stewart, J.) A seizure comprises two necessary elements: (1) the restraint of liberty; *and* (2) action by the officer -- whether physical force or show

of authority -- which effects the restraint. In addition, the officer must intend that his act restrain the person; restraint as a result of official negligence is not a seizure under the Fourth Amendment. *Brower* v. *County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628, 635 (1989) ("governmental termination of freedom of movement *through means intentionally applied*" [emphasis in original]); *accord, Michigan Dep't of State Police* v. *Sitz*, 496 U.S. ___, 110 L.Ed.2d 412, 420 (1990). Simply stated, "[a] Fourth Amendment seizure occurs when an individual remains in the control of law enforcement officials because he reasonably believes, on the basis of their conduct toward him, that he is not free to go." *Chesternut*, at 577 (concurring opinion).

A court can usually ascertain the presence of physical restraint without difficulty (*e.g. Tennessee* v. *Garner*, 471 U.S. 1 [1985]), but the question of whether an officer's conduct in a specific instance amounts to a show of authority presents a more complex issue. To assist trial courts and officers in the field in the resolution of this question, this Court propounded an objective standard: "if,

in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. at 554; *accord, Michigan* v. *Chesternut*, 486 U.S. at 573; *INS* v. *Delgado*, 466 U.S. at 215; *Florida* v. *Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *id.* at 514 (dissenting opinion).

It is important to understand the scope and function of the *Mendenhall* formulation. It has been generally assumed that it is equivalent to the definition of a seizure set forth in the *Terry* dictum. 1 W. LaFave, Search and Seizure § 2.1(a), p. 301 (2d Ed. 1987 and 1990 Supp.) [hereinafter LaFave]. This view is erroneous. Rather, *Mendenhall* explicates only the requirement of a show of authority, defining it as official conduct which would cause a reasonable person to believe that he is not free to leave. *Mendenhall* does not eliminate or otherwise alter the requirement of restraint of the citizen by the officer.[1/]

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1. The fallacy of the view that *Mendenhall* offers a complete definition of a seizure can be demonstrated by the following example. Suppose the police unmistakably indicate to a person that he is not free to leave, but he

A Fourth Amendment seizure has always required restraint or control of the citizen. The two means identified by this Court of exercising that control are physical force and a show of authority, for both unmistakably indicate to a reasonable person that he is not free to leave. In the case of the use of force, the person cannot leave; in the case of the manifestation of authority, the person knows that he may not leave. In either case, there cannot be a seizure without restraint upon the liberty of the person.[2]

Just as *Mendenhall* provided an objective standard for a display of authority, *Brower* v. *County of Inyo, supra*, set forth a bright-line definition of restraint: "a governmental

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nevertheless does so, and attempts to escape. Is he "seized" despite the lack of official restraint upon his movement? If so, does the "seizure" end if he successfully avoids the police? At what point is his escape successful so as to end the "seizure"? The *Terry* requirement of physical restraint, which provides a bright line and is faithful to the values protected by the Fourth Amendment, avoids such insoluble problems. See pp. 37-38, *infra*.

2. An alternative to the *Mendenhall* formulation might be: "A seizure occurs when a person acquiesces in what he reasonably believes to be an official display of authority."

termination of freedom of movement *through means intentionally applied.*" 103 L.Ed.2d at 635 (emphasis in original). Unless the officer has made "an intentional acquisition of physical control" of the citizen (*ibid.*), no seizure has occurred.[3]

We can discover no case in which this Court found a seizure in the absence of termination of freedom of movement, either through the use of force or display of authority. *E.g., Michigan Dep't of State Police* v. *Sitz, supra*; *United States* v. *Sokolow*, 490 U.S. 1 (1989); *United States* v. *Sharpe*, 470 U.S. 675 (1985); *United States* v. *Hensley*, 469 U.S. 221 (1985); *Florida* v. *Rodriquez*, 469 U.S. 1 (1984); *Michigan* v. *Long*, 463 U.S. 1032 (1983); *United States* v. *Place*, 462 U.S. 696 (1983); *Texas* v. *Brown*, 460 U.S. 730 (1983); *Florida* v. *Royer, supra*; *United States* v. *Cortez*, 449 U.S. 411 (1981); *Reid* v. *Georgia*, 448

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3. Somewhat paradoxically, the intent to seize is proved by the objective circumstance of whether a reasonable person would believe that he is not free to leave. *Mendenhall*, 446 U.S. at 554. Thus, intent to acquire physical control, if not communicated, is not a show of force and, thus, no seizure. *Chesternut*, 486 U.S. at 575 n.5.

U.S. 438 (1980); *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Delaware* v. *Prouse*, 440 U.S. 648 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams* v. *Williams*, 407 U.S. 143 (1972); *Sibron* v. *New York*, 392 U.S. 40 (1968). *Michigan* v. *Chesternut, supra,* involved neither a show of authority by the officers nor physical restraint of the defendant. In finding no seizure, this Court chose to rely upon the first consideration, holding that a reasonable person would not have felt that he was not free to leave. 486 U.S. at 574-576. Consistent with this Court's unbroken line of precedent, the concurring opinion suggested that an independent justification for the Court's decision was the absence of "a restraining effect" upon the defendant *Id.* at 577 (concurring opinion). The teaching of this Court's cases is clear: a seizure of the person requires a termination of freedom of movement by the intentional use of either physical force or a show of authority to achieve that termination.

To avoid misunderstanding, we do not argue that only physical restraint, such as the use of handcuffs or the like,

could constitute a seizure of the person under the Fourth Amendment. Such a narrow construction of the Fourth Amendment would allow police to intrude unjustifiably into the privacy and personal security of citizens not reasonably suspected of wrongdoing with the simple and impermissible expedient of threatening -- but not using -- physical force. Our position, faithful to *Terry*, *Mendenhall*, *Royer*, *Delgado*, *Chesternut*, and *Brower*, is that a seizure occurs when police achieve physical control or termination of freedom of movement (those terms are functionally equivalent) through the use of force or a display of authority. Thus, a police officer who commands a pedestrian to stop has effected a detention not through the use of physical force but the exercise of his official authority.

To amplify further, an officer who approaches a person on the street has not effected a seizure in the narrow physical sense because the person remains physically able to walk away. If he choses not to do so, his termination of movement is self-imposed. Whether he is seized in the constitutional sense depends upon the

motivation for his decision to remain. If he does so because he wishes to cooperate with the officer, it is a consensual encounter and thus no seizure. If the person remains in obedience to what a reasonable person would perceive to be a show of authority, he has been seized under the Fourth Amendment. In the *Mendenhall* context, stationary acquiescence to a show of authority is the hallmark of a seizure.

B. <u>Respondent Was Not Detained.</u>

Judged by the foregoing analysis, the conduct of the police officers did not constitute a detention of respondent until Officer Pertoso forced him to the ground after respondent had thrown away the rock of cocaine. We analyze the constitutional significance of the officers' initial sighting of the youths and of Officer Pertoso's subsequent encounter with respondent.

1. <u>The Initial Sighting.</u>

It is indisputable that respondent was not "detained" when the officers turned the corner onto 63rd Avenue. The mere act of patrolling the streets is not a "show of authority" (*Terry*, at 19 n.16) so as to induce the belief in

a reasonable person that he is "not free to leave." *Mendenhall*, at 554. Were it otherwise, every citizen who sees a policeman in the performance of his duties would be "seized." *Cf. Michigan v. Chesternut, supra.*

Furthermore, it is not entirely clear that the youths even knew that McColgin and Pertoso were police officers. It will be recalled that the officers were patrolling in an unmarked car. Although the word "police" was imprinted on the fronts of their jackets, no state court expressly found that respondent or his companions recognized that identification in the darkness of the night at a distance of 40 yards. It is true that the youths immediately ran away upon seeing the vehicle, but this Court's decisions do not support a conclusion that a reasonable person would suspect that two men driving in a brown Dodge in this Oakland neighborhood at 10:00 p.m. are police officers.

Finally, no detention took place because the police officers were 40 yards from the persons who were running away. Under those circumstances the officers could not

have terminated the movement, or otherwise have acquired physical control, of the fleeing youths.

2. **The Encounter Between Respondent and Officer Pertoso.**

We turn to the heart of the case: the encounter between respondent and Officer Pertoso on Foothill Boulevard. The court of appeal explained its holding that respondent had been detained before discarding the cocaine as follows:

> "We have no doubt that it is coercive and intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk. Indeed, the sight of a running officer, even without a command to halt, would reasonably convince most citizens that they were not free to ignore the officer and leave. We disagree with the trial court that there was no detention until the officer physically gained control of the suspect. This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion as to cut him off and confront him head on. Under the rationale of *Chesternut*, this action is

> reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or 'otherwise control the direction or speed' of one's movement. (*Michigan v. Chesternut, supra*, 108 S.Ct. 1975, 1980.)" (J.A. 134.)

We find two distinct reasons to disagree with the court of appeal. First, at the time respondent discarded his rock of cocaine, the officer had not displayed his authority to respondent; consequently, a reasonable person would not have believed that he was not free to leave. Second, at the time of the abandonment of the incriminating evidence, respondent's freedom of movement had not terminated, nor was he otherwise under the physical control of Officer Pertoso.

a. **No Show Of Authority.**

Respondent could not have known that Officer Pertoso had been an occupant of the brown Dodge.

Assuming the unlikely possibility that respondent had seen the word "police" emblazoned on the officer's jacket while Pertoso was seated in the car, the record establishes that he did not know that the officer left the car and circled around the block to intercept him. (J.A. 41.) The court of appeal correctly concluded that police conduct unknown to the citizen cannot constitute to a display of authority which would lead a reasonable person to believe that he is not free to leave. (J.A. 133); *Michigan* v. *Chesternut*, 486 U.S. at 575 n.7. But this factual premise makes the lower court's analysis all the more inexplicable. The court of appeal held that the sight of a police officer -- any police officer -- running in the general direction of a citizen on the street is a sufficient display of authority to lead that citizen reasonably to believe that he may not

leave. Neither law nor human experience supports this assertion.

Hardly a day goes by that an officer on foot patrol -- the cop on the beat -- does not have occasion to run in someone's direction for a socially desirable reason. He may do so to prevent a crime or to apprehend a person whom he has reason to suspect has committed a public offense. He may also be engaged "in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady* v. *Dombrowski*, 413 U.S. 433, 441 (1973). Thus, the officer may be required to engage in such non-investigatory matters "as giving aid to persons in distress, mediating domestic quarrels, assisting the elderly or disabled, furnishing traffic advice

or directions, and generally preserving the peace and protecting persons from harm or annoyance." *In re Tony C.*, 21 Cal.3d 888, 895-896, 148 Cal.Rptr. 366 (1978).

Of course, not all of the foregoing possibilities would require a police officer to hurry down the street of a residential neighborhood at 10:00 p.m., but it is irrefutable that the sight of a running police officer does not always support a reasonable belief that the officer intends to detain someone. For all a reasonable person in respondent's position could have deduced, Officer Pertoso -- coming from a direction *opposite* to that where respondent had seen the Dodge -- could have been answering a distress call or investigating some matter which had nothing to do with respondent.

It may be contended that respondent reasonably could have believed that he was the object of Officer

Pertoso's attention because, possessed of cocaine, he was in the act of committing a crime when he encountered the officer. A person's knowledge of his own wrongdoing, at least knowledge of which officer is unaware, cannot convert the officer's otherwise nonconfrontational conduct into a seizure. Such a principle would provide more protection to the guilty than to the innocent, a result which is surely inconsistent with the objectives of the Fourth Amendment. *United States* v. *Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977); *People* v. *Holloway*, 176 Cal.App.3d 150, 156, 221 Cal.Rptr. 394 (1985); 3 W. LaFave, *supra*, § 9.2(h), pp. 407-408 (2d Ed. 1987 and Supp. 1990).

A police officer who walks down the street does not seize anyone who happens to be in his path. *United States* v. *Mendenhall, supra*; *Michigan* v. *Chesternut, supra*. The officer's conduct is not transformed into a seizure of

everyone in his vicinity by the simple and often necessary act of running. The mere fact that the officer is running in the general direction of a person is not a display of authority which would indicate to a reasonable person that he is not free to leave. The record must reveal other specific and articulable circumstances which, together with the officer's rapid movement, characterize that movement as a display of authority toward that specific person.

At the instant that respondent discarded his cocaine he knew only that the officer was running in his direction. There was no "threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States* v. *Mendenhall*, 446 U.S. at 554. Officer Pertoso did not

display a badge or gun, or command respondent to halt. Because respondent fled before Pertoso left the car, respondent could not have known that the officer had circled the block in an effort to intercept him. It follows that a reasonable person in respondent's position would not have believed that the officer's act of approaching in his direction was a display of authority which indicated that he was not free to leave. The state court erred in holding to the contrary.

b. **No Physical Restraint.**

Wholly aside from its conclusion that Officer Pertoso's conduct constituted a display of authority, we have a second reason to disagree with the court of appeal's ruling that a seizure had occurred when respondent discarded his contraband. At that moment there was not yet "a governmental termination of freedom

of movement" or, what is functionally equivalent, "an intentional acquisition of physical control." *Brower* v. *County of Inyo*, 103 L.Ed.2d at 635. When respondent saw the officer, he did not surrender to the officer. Instead, he performed two acts which were entirely inconsistent with submission to the presence of authority. First, he threw the rock of cocaine to the sidewalk. Second, he "continued towards" the officer, who only then "forced him on to the grass and handcuffed him." (J.A. 42.) The evidence is undisputed, and the trial court found (J.A. 55), that respondent was not in the control of Officer Pertoso until the latter forcibly restrained him by pushing him to the ground and handcuffing him.

The court of appeal opined that "the facts of the instant case illustrate a situation tantamount to a physical seizure. [Respondent,] who was running down the

sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a jacket marked 'police,' who was 11 feet away and running toward him." (J.A. 137 n.4.) The court of appeal measured the relevant Fourth Amendment interests with too broad a gauge.

If respondent had been surrounded on the street by officers who deprived him of freedom of movement, he would have been seized under the Fourth Amendment. Instead, he encountered only Officer Pertoso, a single police officer who was, in effect, attempting to "tackle" respondent in the "open field" of a dark street. Had respondent chosen to do so, he could have attempted to elude Pertoso by, for example, running to the other side of the street or turning around and retracing his steps. Those possibilities reflect a freedom of movement which

undermines the state court's holding that respondent had been seized. Seizure requires the "intentional acquisition of physical control." *Brower*, at 635. There is a constitutional difference between the mere influencing of direction, found by the state court, and the acquisition of such control. A person with the options of movement which respondent possessed is not in the "physical control" of a police officer, although the officer has blocked the path of that person. Simply stated, respondent was not seized at the time he discarded the rock of cocaine because Officer Pertoso had not yet gained control over him. The trial court's finding on this issue is unassailably correct.

In finding control "tantamount to a physical seizure," (J.A. 137 n.4), the court of appeal relied upon the observation in *Chesternut* that the officer there did not

"control the direction or speed of [the defendant's] movement." 486 U.S. at 575. By negative implication, the state court reasoned, an officer's influence upon the direction or speed of movement amounts to a seizure. The court of appeal failed to realize that the basis of this Court's decision in *Chesternut* was the absence of a display of authority, not the lack of a restraining effect. Although an officer's attempt to influence a person's direction of movement in some instances may amount to a display of authority which leads a reasonable person to conclude that he is not free to leave, this Court has never held such an official action is an acquisition of physical control. A person whose direction is "influenced" is not seized if he is physically able to travel in that direction.

The conclusion that Officer Pertoso seized respondent when the two encountered each other is no more than a

prediction which hindsight proved accurate. The soundness of the state court's methodology must be tested by positing the contra-factual circumstances of successful flight and escape by respondent. The legal consequences of respondent's successful avoidance of Pertoso's capture are far from clear under the state court's reasoning. If respondent had eluded Pertoso, would the officer's subsequent pursuit have constituted a seizure? *Chesternut*, at 575-576 n.9; Note, *Michigan* v. *Chesternut* and Investigative Pursuits: Is There No End To The War Between The Constitution And Common Sense?, 40 Hast.L.J. 203, 214-219 (1988). If so, when would the seizure have ended? When respondent no longer could see the officer? When he reached a place of apparent safety? When he arrived home? When he (or a reasonable person) no longer allowed his conduct to be

influenced by the possibility of capture? When the statute of limitations ran? Resort to such fictions is unnecessary under this Court's present requirement of physical control. For these reasons, this Court should not abandon this requirement, which both provides a bright line and respects the history and purposes of the Fourth Amendment. *See Rakas* v. *Illinois*, 439 U.S. 128, 145 (1978). When respondent abandoned his cocaine, he was not under the control of Officer Pertoso, and therefore was not seized within the meaning of the Fourth Amendment.

C. Pursuit In The Wake Of Unprovoked Flight Is Not A Seizure.

Underlying the analysis of the court of appeal is the unarticulated premise that Officer Pertoso should not have been pursuing respondent at all and that their confrontation was not merely the beginning but the culmination of unreasonable police conduct which violated

the Fourth Amendment. We dispute the proposition that the officer's conduct implicated the provisions of that amendment.

To begin with, we do not argue that "a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." *Michigan* v. *Chesternut*, 486 U.S. at 572. Rather, we address only the conduct which this case presents: pursuit in the face of flight unprovoked by threatening or otherwise illegal police conduct. To determine whether such conduct constitutes a seizure,[4]

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4. As the state court of appeal correctly observed (J.A. 138), we did not contest the trial court's ruling (J.A. 54-55) that the officers lacked sufficient grounds to detain respondent. The prosecuting authority had argued that respondent was not seized at the time he discarded his cocaine (J.A. 50-51), and state law discourages the presentation on appeal of a new theory not raised at trial to justify a search. *People* v. *Smith*, 34 Cal.3d 251, 271, 193 Cal.Rptr. 692 (1983). Furthermore, this state's highest court had rejected the argument that flight alone justified a detention. *People* v. *Aldridge*, 35 Cal.3d 473, 479, 198 Cal.Rptr. 538 (1984). But we have never conceded the officers' conduct, if it constituted a seizure, was illegal. Our position was and remains that it was not a seizure at all. Recognizing that exclusionary rule considerations often define the scope of the right of privacy (1 LaFave, *supra*, § 2.1(d), at pp. 313-314 [2d Ed. 1987 and Supp. 1990]; A. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L.Rev. 349, 403 [1974]), we argue that pursuit *by any officer* in the face of unprovoked flight does not encroach upon a commonly shared "sense of security" to the extent that it requires regulation under the Fourth Amendment. Amsterdam, *supra*, at 403; *United States* v. *White*, 401 U.S. at 786 (dissenting opinion). Thus it is appropriate to assess the reasons for pursuit, its efficacy, and the extent of the invasion into privacy which it occasions in order to determine whether it should be denominated a seizure under the Fourth Amendment in order to facilitate judicial review.

and is therefore subject to judicial review, we "assess[] the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." *United States* v. *White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting.)

Consistent with the time-honored observation that "[t]he wicked flee when no man pursueth" (*Proverbs* 28:1), this Court has declared that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect

to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." *Peters* v. *New York*, 392 U.S. 40, 66-67 (1968). Although this Court has also concluded that flight in some circumstances may be "ambiguous" (*Wong Sun* v. *United States*, 371 U.S. 471, 484 [1963]), this characterization was made in the context of determining that flight provoked by police did not amount to probable cause to arrest. *Id.* at 483-484. By contrast, we address the question whether unprovoked flight may provide grounds merely to pursue a citizen.

It is perhaps more useful to approach the issue by asking whether, as the court of appeal impliedly found, the Fourth Amendment should *always* forbid police from pursuing a person who suddenly turned and fled unless the officers have other information to connect that person to a crime. *See* 3 LaFave, *supra*, § 9.3(b), p. 433 n.60. Must the officer "stand by idly and watch the defendant run away" knowing that he "cannot follow after him without seizing him for purposes the Fourth Amendment?" *People* v. *Mamon*, 435 Mich. 1, 457 N.W.2d 623, 628 (1990). Clearly the answer is "no."

While an innocent reason may exist for flight, innocent conduct nevertheless may be suspicious. *United States* v. *Sokolow,* 490 U.S. at 11-12. The court of appeal incorrectly struck the balance between public safety and private security by creating a conclusive presumption that flight alone betokens innocence. Just as danger invites rescue, unprovoked flight invites inquiry. The Fourth Amendment does not compel police to "be ignorant as [officers] of what [they] know as men." *Watts* v. *Indiana*, 338 U.S. 49, 52 (1949).

Balanced against society's need to investigate suspicious behavior is the extent of the intrusion into privacy and personal security. The court of appeal presumed that every pursuit would result in a completed detention. By invalidating the officers's conduct, the court of appeal therefore necessarily disapproved police investigatory techniques which this Court has declared do not intrude upon Fourth Amendment values.

This Court has held that police surveillance does not constitute a search under the Fourth Amendment. *United States* v. *Knotts*, 460 U.S. 276, 281-285 (1983); *accord,*

United States v. *Karo*, 468 U.S. 705, 713-714 (1984). Nor does an officer necessarily seize one whom he approaches on the street to ask a few questions. *INS* v. *Delgado*, 466 U.S. at 216. It is simply not true that each pursuit will culminate in a *Terry* detention. In some instances the officer may wish to surveil the person's conduct in order to see where he goes and what he does. In other situations the officer may wish to see the fleeing person's face to determine whether he matches a photograph on a wanted flyer. No person, of course, has a reasonable expectation of privacy in his visage. *United States* v. *Dionisio*, 410 U.S. 1, 14 (1973). Should the officer overtake the person pursued, the officer's subsequent conduct may involve nothing more threatening than the asking of a few questions. In all of these situations, involving "nonoffensive contact if it occurred between two ordinary citizens" (3 LaFave, *supra*, § 9.2(h), p. 412), the encounters are not seizures. Under the analysis of the court of appeal, however, each would potentially violate the Fourth Amendment.

Finally, although the possible existence of less restrictive alternatives is irrelevant to a determination whether a search or seizure is reasonable (*United States* v. *Sokolow, supra,* 490 U.S. at 12; *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 542 [1985]), the lack of such alternatives is surely relevant to the issue of whether a particular police practice is a search or seizure at all. We can think of no alternative to pursuit which would achieve the valid investigatory goals of surveillance, visual identification, and the attempt to question about the reasons for flight. Although one commentator has suggested the state's interest in surveillance could be satisfied by permitting the police to follow, rather than to chase (Note, *supra*, 40 Hastings L.J. at 228), such a rule provides no discernible guideline for police, for it is often impossible to determine when the act of following has become a "chase." *See People* v. *Mamon, supra*, 435 Mich. 1, 457 N.W.2d at 627 n.8 (1990). If the person is walking at a speed of two miles per hour but the officer is pursuing at three miles per hour, is it a "chase" even if two blocks still separate them? *Id.* at 1, 457 N.W.2d at

628. In addition, following without approaching a person makes impossible the valid objectives of identification and interviewing.

For the foregoing reasons, the court of appeal erred in its balance of competing interests present in the context of a pursuit in the face of unprovoked flight. The public interest is substantial, no other means are available to achieve that interest, and the impact upon private security may be nonexistent. "Where the factual premises for a rule are so generally prevalent that little would be lost and much would be gained by abandoning case-by-case analysis, we have not hesitated to do so." *Rakas* v. *Illinois*, 439 U.S. at 147. In the case of unprovoked flight, the prevalent factual premises lead ineluctably to the conclusion that pursuit is not a seizure under the Fourth Amendment until physical control of the person is acquired by means of force or a show of authority.

It has been suggested that the requirement of physical control would exclude from Fourth Amendment reach various forms of threatening but otherwise non-restraining police conduct intended to be "evidence-gathering

technique[s]" (3 LaFave, *supra*, § 9.2, at p. 39 [Supp. 1990]), or "harassing police misconduct that seeks to prompt the victim into revealing what would otherwise be the product of an unreasonable search and seizure if conducted by the officer." E. Mascolo, The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis, 20 Buff.L.Rev. 399, 419 (1971). As we explain more fully in Argument II, police conduct which a reasonable person would believe is intended to produce incriminating evidence is a search which is subject to the strictures of the Fourth Amendment. *Cf. Brower* v. *County of Inyo*, 103 L.Ed.2d at 636. The record in this case is barren of evidence to indicate that Officer Pertoso intended to search respondent. When respondent and Pertoso encountered each other in the street, the officer had done nothing by word or deed to manifest a desire to conduct a search.

It may also be suggested that the requirement of physical restraint would leave unregulated those forms of official misconduct intended solely to harass, or in which the police may engage when they "have no interest in

prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." *Terry* v. *Ohio*, 392 U.S. at 14. This case, which involves pursuit in the wake of unprovoked flight, presents no such scenario, and we endorse no such conduct. If such harassing law enforcement practices should eventually come before this Court, "there will be time enough then to determine whether different constitutional principles may be applicable." *United States* v. *Knotts*, 460 U.S. at 283-284. For now, it is enough to note that respondent was not the victim of such a reprehensible police practice.

II.

RESPONDENT'S ABANDONMENT OF HIS COCAINE WAS NOT FRUIT OF THE POISONOUS TREE.

Even assuming that respondent was unlawfully "seized" when he initially encountered Officer Pertoso, we urge that the rock of cocaine which he threw to the street was admissible in evidence under the Fourth Amendment.

It is beyond dispute that his abandonment[5] of the incriminating evidence was voluntary in the sense that the officer did not order him to discard or surrender it. *Abel* v. *United States*, 362 U.S. 217, 241 (1960); *cf. Smith* v. *Ohio*, 494 U.S. ___, 108 L.Ed.2d 464, 468 (1990). However, the court of appeal found that the exposure of the cocaine was an exploitation of the officer's illegal activity:

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5. "The test for abandonment in the search and seizure context is distinct from the property law notion of abandonment: it is possible for a person to retain a property interest in an item, but nevertheless to relinquish his or her reasonable expectation of privacy in the object." *United States* v. *Thomas*, 864 F.2d 843, 845 (D.C. Cir. 1989). For the reasons set forth in the text, *infra*, the critical issue is whether respondent's surrender of his expectation of privacy of the cocaine to public view is constitutionally attributable to any official misconduct which violated the Fourth Amendment. E. Mascolo, The Role of Abandonment in the Law of Search and Seizure, supra, 20 Buff.L.Rev. at 415-421. If there is no such exploitative nexus, the exposure of the cocaine was not the result of a search. Its subsequent seizure was justified because the officer had a right to be on the street, and from that vantage point saw an item whose incriminating character was "immediately apparent." *Horton* v. *California*, ___ U.S. ___, 110 L.Ed.2d 112, 123 (1990); *Arizona* v. *Hicks*, 480 U.S. 321, 326-327 (1987).

> "Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer's stated purpose in pursuing [respondent] was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's acts were unfounded, as he admitted he originally saw nothing suspicious other than the four Black youths standing near a car. [Respondent's] act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence. [Citation omitted.] To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction." (J.A. 142-143.)

The above quotation adequately describes the causal connection between the officer and the ultimate recovery of the contraband; if not for the officer's efforts to detain respondent, the latter would not have thrown away the

cocaine but would have kept it secreted in his pocket and gone on his way. The court of appeal failed to identify the exploitational nexus between the officer's presence and the abandonment of cocaine. Specifically, the court did not explain how the illegal nature of the officer's conduct purposefully produced the contraband.

A. <u>Because There Was No Intent To Search, There Was No Fruit Of The Poisonous Tree.</u>

In *Wong Sun* v. *United States*, 371 U.S. 471 (1963), this Court rejected the broad test of physical causation, which the court of appeal in reality applied in this case. Instead, this Court declared that "the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* at 488. All of the cases decided by this Court under the "fruit of the poisonous tree" rubric have in common one critical element entirely lacking in this case: All have involved a purposeful

attempt by law enforcement authorities to gather evidence, either at the time of the illegality or subsequent to, and in exploitation of, the illegal conduct. Without such an intent there can be no exploitation within the meaning of *Wong Sun*.

In *Wong Sun* itself, for example, after illegally arresting "Blackie" Toy, one of the officers advised him that "[Hom Way] says he got narcotics from you." *Id.* at 474. Toy's subsequent inadmissible statement was in response to the officer's confrontational advisement, which was "reasonably likely to elicit an incriminating response." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). *Brown* v. *Illinois*, 422 U.S. 590 (1975), also involved interrogation after an illegal arrest. *Accord, Lanier* v. *South Carolina*, 474 U.S. 25 (1985); *Taylor* v. *Alabama*, 457 U.S. 687 (1982); *Dunaway* v. *New York*, 442 U.S. 189 (1979).

Even in those cases in which this Court found no fruit of the poisonous tree because of inevitable discovery, independent source, or another theory of attenuation, the police had engaged in an effort to gather tangible evidence, incriminating statements, or the testimony of

witnesses. *E.g., New York* v. *Harris*, 495 U.S. ___, 109 L.Ed.2d 13 (1990); *Murray* v. *United States*, 487 U.S. 533 (1988); *Oregon* v. *Elstad*, 470 U.S. 298 (1985); *Segura* v. *United States*, 468 U.S. 796 (1984); *Nix* v. *Williams*, 467 U.S. 431 (1984); *United States* v. *Crews*, 445 U.S. 463 (1980); *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

Exploitation in the constitutional sense requires an intent to acquire more evidence than that which the primary illegality provides. In the present Fourth Amendment context, quite simply, the officer must intend to conduct a search for evidence. We believe that *Brower* v. *County of Inyo, supra*, is compelling authority for this proposition.

In *Brower*, this Court, relying upon *Hester* v. *United States*, 265 U.S. 57 (1924), declared that the recovery of incriminating evidence discarded by a defendant while he fled from police was not a seizure under the Fourth Amendment. 103 L.Ed.2d at 636. "Thus, even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action

by the police, the Court held that no seizure had taken place. It would have been quite different, of course, if the revenue agent had shouted 'Stop and give us those bottles, in the name of the law!' and the defendant and his accomplice complied. Then the taking of possession would have been not merely the result of government action but the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred." *Ibid.*

Brower provides the analytical framework with which to resolve the present issue. Here, as in *Hester*, the defendant would not have discarded the evidence but for the officer's action. Such a causal nexus is not sufficient to invoke the Fourth Amendment exclusionary sanction, however. Rather, the taking of possession must be the intended result of the very means which the officer selected. In this case, had Officer Pertoso manifested an intent to seize evidence by ordering, "Take out what you have in your pockets," or even "I intend to search you," respondent's production of the cocaine would have been a *search*: the intended result of the officer's actions.

Officer Pertoso, of course, did not verbalize such an intent. He merely ran in respondent's general direction. For reasons which follow, we do not believe that such action indicated an intent to search. Absent such an intent, communicated to respondent, the subsequent recovery of the contraband was not a *seizure*.

The record in this case contains no evidence, and consequently there is no state court finding, that Officer Pertoso intended to search respondent. A conclusion of such intent must be based, if at all, upon a presumption that an officer who effects an illegal detention will also conduct an illegal search of the person. A presumption is, after all, a rule of law which resolves a question of fact in the absence of evidence. In the context of a Fourth Amendment claim, a presumption must be based on "factual premises" that are "so generally prevalent that little would be lost and much would be gained" by adoption of the presumption. *Rakas* v. *Illinois*, 439 U.S. at 147. We do not believe that the necessary predicate facts exist to justify such an unprecedented presumption.

Cf. Francis v. *Franklin*, 471 U.S. 307, 314 (1985).

It is one thing to detain -- or threaten to detain -- a person on the street; it is quite another matter to commit the additional intrusion of searching him for weapons. To do so, the police officer "must be able to point to specific and articulable facts" which indicate that the detainee was armed and dangerous. *Terry* v. *Ohio*, 392 U.S. at 21, 30; *Adams* v. *Williams*, 407 U.S. at 146. If a police officer intends to detain a person on the street, even illegally, it does not follow that he will commit the additional intrusion of conducting a pat search, let alone a search sufficiently intense to uncover a rock of cocaine. For example, a police officer who mistakenly but in good faith believes that he has grounds to detain a person on the street may also conclude (correctly) that the person's behavior does not justify a search of the person. The detention is no less unlawful by reason of the officer's

good faith, but that same state of mind rebuts any presumption that he will engage in further unlawful conduct. In other words, a rule that an unlawful seizure of a person will inevitably result in an unlawful personal search of that person necessarily assumes the bad faith of every officer who transgresses the provisions of the Fourth Amendment, however inadvertently. This Court has recognized that not every violation of the Fourth Amendment involves knowing misconduct. *United States* v. *Leon*, 468 U.S. 897 (1984); *United States* v. *Peltier*, 422 U.S. 531 (1975); *cf. Michigan* v. *Tucker, supra*.

The court of appeal provided no empirical data, and we can discover none, which suggests that police officers detaining persons in the street are likely to violate the Fourth Amendment knowingly. In the absence of such

evidence,[6] we see no reason to presume the prevalent bad faith of an entire class of peace officers who are charged with preserving the security of the citizenry.

The state court of appeal asserted that suppression of the cocaine served the purpose of the exclusionary rule by deterring police from attempting to detain persons without reasonable suspicion of wrongdoing. (J.A. 143.) However, application of the exclusionary rule, which exacts "substantial social costs" (*Leon*, at 907), "has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). At the very least, the sanction of exclusion should be appropriate to address the

6. Studies have shown that police do not frisk every person whom they detain. 3 LaFave, *supra*, § 9.4(a), p. 505 n.26. There is no reason to believe that these findings are less true in those instances which involve illegal detentions.

official misfeasance in question. *See Illinois* v. *Krull*, 480 U.S. 340, 352 (1987). It is particularly inappropriate in this case.

For the reasons stated in Argument I, the officers' conduct did not violate the Fourth Amendment at all. The chase, undertaken in response to respondent's unprovoked flight, was reasonable conduct and did not restrain respondent at the time he discarded his cocaine. Thus, there was no misconduct which required deterrence. Even if the officers' pursuit implicated the Fourth Amendment, suppression of the evidence would have no significant deterrent effect. The officers intended to detain respondent for questioning, not to search him. Suppression of the cocaine, an unintended product of the chase, will provide little, if any, deterrence to police officers who want only to detain a person to ask a few

questions and have no concern about conducting a search.

To avoid any misunderstanding, we do not argue that the answers to questions posed by an officer during an illegal detention are admissible under the Fourth Amendment, for surely they are not. *Taylor* v. *Alabama, supra; Dunaway* v. *New York, supra*. Because the questioning is purposeful, suppression of the answers presumably will further the goal of deterrence. Nor do we assert the legality of plain sight observations made by an officer who has unlawfully detained a motorist in his automobile. *Cf. Harris* v. *United States*, 390 U.S. 234, 236 (1968). An officer must be held to understand that the inevitable consequence of such a detention is the opportunity to observe what otherwise would have been unavailable to him. We merely argue that pursuit, even detention, by an officer who has not manifested an intent

to search is, for that reason, not a search. *Brower* v. *County of Inyo, supra.* On the other hand, the decision of a person threatened with a detention to hide or discard incriminating evidence is "'an intervening act of a free will'" which attentuates the connection between any illegality and the recovery of evidence. *Wong Sun*, at 486, 491. The contrary rule applied by that state appellate court leaves to the fugitive, rather than to the courts, the determination of the appropriate exclusionary sanction for an unlawful detention.

Persons in respondent's position are not left defenseless by this result. As the trial court perceptively analyzed the issue:

> "[I]f you don't discard [the evidence] and the police find it as a result of an illegal search, it will automatically be suppressed. Just logic tell[s] me there's no justification for saying if you throw it away just before the cop get[s] to

> you when he's chasing you, it will be suppressed. It should be suppressed. If you leave it in your pocket and he searched you illegally, it's guaranteed to be suppressed. No question about it." (J.A. 73.)

When respondent threw away the cocaine, he was not attempting to vindicate the security of his person. Rather, he tried physically to disassociate himself from the contraband in an effort to exculpate himself. Despite the Fourth Amendment's silence on this preemptive form of self-help, the court of appeal chose to legitimate it and, in so doing, created a brand-new constitutional right: the right of a person who fears detention by a police officer to immunize himself from prosecution by discarding incriminating evidence on his person. This transformation of a desperate act of attempted exculpation into a constitutionally protected right is unnecessary to vindicate the purposes of the exclusionary rule and is unfaithful to

the language of the Fourth Amendment, which does not speak of "attempted" searches and seizures.

B. <u>Applicable Legal Standard.</u>

Finally, we address the standard to be applied in determining whether a citizen is entitled to believe that an officer intends to search him. Recent decisions of this Court have taught that an inquiry into the reasonableness of police conduct under the Fourth Amendment requires an objective assessment of the actions of the police in light of the circumstances confronting them. *See Graham* v. *Connor*, ___ U.S. ___, 109 S.Ct. 1865, 1872 (1989); *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983); *Scott* v. *United States*, 436 U.S. 128, 136-138 (1978); *but see Murray* v. *United States*, 487 U.S. at 542. The

reasonable person standard should be equally applicable to the determination of whether an officer's conduct constitutes a search: If, in view of all of the circumstances surrounding the incident, a reasonable person believes that the officer intends to search him with sufficient intensity to discover evidence, then his actions in the production of incriminating evidence must be attributable to the officer's conduct and thus a search under the Fourth Amendment.

It may be argued that this formulation provides no bright line to determine the admissibility of evidence discarded by a person fleeing from the police. "Probable cause" and "reasonable suspicion," also requiring a consideration of the totality of the circumstances (*Illinois* v. *Gates*, 462 U.S. 213, 230-241 [1983]; *United States* v. *Cortez*, 449 U.S. at 417), are similarly amorphous. More

fundamentally, this argument is beside the point. As we have endeavored to explain in both Arguments of this Brief, *Mendenhall* provides an inappropriate standard to determine the evidentiary consequences of police pursuit. The relevant issue is whether the officer's conduct invaded the person's reasonable expectation of privacy in his personal effects. *See Katz* v. *United States*, 389 U.S. 347 (1967); *accord*, *California* v. *Greenwood*, 486 U.S. 35 (1988); *California* v. *Circaolo*, 476 U.S. 207 (1986); *Smith* v. *Maryland*, 442 U.S. 735, 739-740 (1979). In other words, *Katz* provides the appropriate analytical framework to resolve the admissibility of the evidence in this case.

Under this formulation, which focuses upon a reasonable person's belief that a search is imminent, a person can be searched although not seized. Supporting this conclusion is the example in *Brower* of the officer who

ordered a fleeing person to surrender his possession "in the name of the law." 103 L.Ed. at 636. For the reasons set forth in Argument I, the person was not seized if he continued to flee after dropping the article; nevertheless, his abandonment of incriminating evidence was the result of a "search," for his discarding of the evidence was attributable to the officer's command. Under such circumstances the officer has searched the person as surely as if he had thrust his hand in the latter's pocket. A governmental intrusion into a person's reasonable expectation of privacy requires no physical trespass. *Katz* v. *United States, supra*, 389 U.S. 347.

In light of this conclusion, we discuss the types of evidence relevant to the reasonableness of a person's belief that an officer intends to search him. In the context of this case, such evidence includes the existence

of physical control by the officer of the person; the fact and nature of any show of authority by the officer; any other acts or words manifesting an intent to search; and any prior contacts between the person and the police officer.[7]

Although it cannot be accorded controlling significance, a person's status as a detainee is relevant to the reasonableness of his belief that he will be searched. The extent of the officer's control of the person's freedom of movement may induce a reasonable person to believe that a personal search is likely. Further, the likelihood of the search, and the reasonableness of the belief, are directly proportionate to the nature and intensity of the control. Thus, a person under custodial arrest reasonably

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7. The defendent must bear the burden of proving the exploitative nexus between the illegality and the challenged evidence. *Alderman* v. *United States*, 394 U.S. 165, 183 (1969).

can expect to be searched (*United States* v. *Robinson*, 414 U.S. 218 [1973]); a person under detention may assume its possibility but only if other circumstances support that conclusion; a person who sees an officer approaching him at a distance of one block has little reason to fear an immediate search; an officer even farther away poses a correspondingly smaller threat. *Cf. State* v. *Washington*, 364 So.2d 949 (La. 1978). As explained in part A of this Argument, the illegality of the detention, either actual or threatened, creates no conclusive presumption that an illegal search will occur; it is merely one factor to be considered in determining the reasonableness of the person's belief.[8/]

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8. Of course, an officer having reasonable cause to detain a person may, for that reason alone, pursue him. The discussion in the text presupposes no such cause and addresses the separate issue of when a person fleeing from police should reasonably fear a search.

Also relevant are the fact and nature of a show of authority. Just as an officer who approaches a person to ask a few questions does not manifest an intent to seize (*INS* v. *Delgado*, *supra*), *a fortiori* he would give no reasonable person cause to fear a search. *Cf. In re Kemonte H.*, 223 Cal.App.3d 1507, 273 Cal.Rptr. 317 (1990); *People* v. *Williams*, 109 Mich. App. 768, 312 N.W.2d 155 (1981). At the other end of the spectrum, an inappropriate show of authority or display of force would lead a reasonable person to believe that the officer intends to search. *Cf. Commonwealth* v. *Thibeau*, 384 Mass. 762, 764, 429 N.E.2d 1009, 1010 (1981). An officer's attempt to overtake a person on the street to question him, without more, is not such a show of authority. *Cf. State* v. *Sheffield*, 62 N.J. 441, 303 A.2d 68 (1973).

We reiterate that a person whose liberty has been unlawfully restrained by means of a show of authority or the use of force may not reasonably believe, based solely upon that illegality, that the officer intends to search him. More evidence is necessary to establish the reasonableness of that belief. To that end an officer's words or actions indicating a desire to search or seize evidence are relevant. *Cf. Brower* v. *County of Inyo, supra,* at 636. The person's previous experiences with the officer may also be competent evidence. 1 LaFave, *supra*, § 2.6(b), p. 474.

Judged by these standards, respondent's discarding of the contraband was neither the product of a search nor fruit of the poisonous tree.[9/] The officer had done

9. One distinguished commentator has suggested that even if the abandonment of incriminating evidence is not a search under *Brower*, it may still be fruit of the poisonous tree under *Wong Sun*. 3 LaFave, *supra*, § 9.2 at p. 40 & n.272.9 (Supp. 1990). We disagree. If there is no intent to search, and thus no search under *Brower*,

nothing to indicate to a reasonable person that he was not free to leave. For that reason alone respondent could not reasonably have feared a search. Additionally, he was not in the control of the officer, who could not have searched respondent under those circumstances. Furthermore, the officer had done nothing else by word or deed to indicate that he intended to search respondent. Finally, no evidence of prior harassment of respondent by Officer Pertoso appears in the record. Unreasonably fearing that he would be searched, respondent chose to engage in self-help by trying to discard the cocaine without detection. The Constitution does not always protect a person from the legal consequences of an unwise choice. *Cf. McGautha* v. *California*, 402 U.S. 183,

then there is also no exploitation, and thus no fruit of the poisonous tree under *Wong Sun*.

213 (1971). Respondent must now accept the consequences of his decision.

CONCLUSION

The judgment of the California Court of Appeal for the First Appellate District should be reversed.

DATED: November 14, 1990

RESPECTFULLY SUBMITTED

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No. 98-1662

In The

Supreme Court of the United States

October Term, 1998

CALIFORNIA,

Petitioner,

v.

HODARI D.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether this Court should change the test for a seizure under *Mendenhall* and *Chesternut* to require an actual physical restraint of a fleeing suspect.

2. Where an individual discards evidence in the course of an illegal detention and there are no intervening circumstances, is the discarded evidence a fruit of the illegal detention?

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OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District was reported at *In re Hodari D.*, 216 Cal.App.3d 745, 265 Cal.Rptr. 79 (1989). A copy of the opinion is in the Joint Appendix at J.A. 126-145. On March 15, 1990, the California Supreme Court denied review of the opinion but ordered the opinion to be depublished. A copy of the order of denial appears in the Joint Appendix at J.A. 146.

JURISDICTION

The California Supreme Court denied review of the Court of Appeals decision on March 15, 1990. Under California Rules of Court sections 24(a), 25(a) and 28(f), the Court of Appeal opinion then became final and reviewable by this Court.

A petition for writ of certiorari was filed on April 18, 1990, within 90 days of the denial of review by the state supreme court. Supreme Court Rules, rule 13.1 On October 1, 1990, this Court granted certiorari.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . "

STATEMENT

A. The Underlying Facts.

On April 18, 1988, at approximately 10:00 p.m., Officers McCoglin and Pertoso of the Oakland Police Department's Narcotics Task Force were patrolling in an unmarked brown Dodge in the area of 63rd avenue in Oakland. (Joint Appendix (J.A.) 27.) They were wearing blue jackets with "police" written on the front and back, blue jeans, tennis shoes and gun belts. (J.A. 26.) Both officers were familiar with this area because it was reputedly "an area with high narcotic activity." (J.A. 28.) The officers had participated in narcotic arrests in this area before. (J.A. 28.).

The officers turned southbound on 64th Avenue, where they saw four young black males standing around a red compact car which was parked along the curb. (J.A. 27.) The officers were approximately 40 yards away. (J.A. 39.)

Both officers believed they had interrupted some kind of narcotic activity. (J.A. 40.) However, neither officer, prior to appellant's arrest, saw any money or drugs being exchanged. (J.A. 43.) As they turned southbound, "a couple of the guys looked up towards" the officers. (J.A. 39.) Two of the young men ran south on 64th Street, and the other two young men ran westbound to the rear

of an abandoned house. (J.A. 39.) The red car departed southbound "at a high rate of speed." (J.A. 39.) The officers did not recognize any of the individuals. (J.A. 35, 40.)

Officer Pertoso got out of the car to give chase, but he was unable to see any of the faces of the individuals because they were out of sight. (J.A. 41.)

Officer Pertoso ran northbound on 63rd and then westbound on Foothill. (J.A. 41.) Officer McCoglin then drove around the block in an effort to catch them. (J.A. 36.) Officer Pertoso was running to try to cut them off in order to detain these individuals and "find out what they were about." (J.A. 44.) As Officer Pertoso was trying to cut them off, he encountered Hodari running towards him and looking over his shoulder as if someone was following him. (J.A. 41.) Hodari had a startled look on his face when he saw the officer running towards him. (J.A. 46.)

When they were approximately 11 feet apart, he saw Hodari "in a underhand scooping motion"discard a single loose rock, alongside of a house. (J.A. 41-42.) Hodari continued toward Officer Pertoso, who forced Hodari to the grass and handcuffed him. (J.A. 42.) Officer Pertoso recovered the discarded object, which turned out to be rock cocaine. (J.A. 42-43.)

Officer McCoglin then conducted a search of the area along with the other individuals had run, and he found a clear plastic sandwich bag that contained approximately 15 of white chunks of suspected cocaine. (J.A. 31.) He never did see the bag with approximately 15 rocks in anyone's possession. (J.A. 36.)

B. The Juvenile Court Proceedings.

On April 20, 1988, a petition under California Welfare and Institutions Code section 602 alleging a violation of Health and Safety Code section 11350 (possession of cocaine for sale) was filed. (J.A. 1-2.)

On May 2, 1988, Hodari filed a motion under Welfare and Institutions Code section 700.1 to suppress all physical evidence seized as a result of his detention. (J.A. 3-17.)

On May 19, 1988, the juvenile court found that the chase was illegal and that the police officers did not have a right to chase him or to detain him. (J.A. 55.)

After the juvenile court expressed concern about the nexus between the illegal chase and the evidence, it denied Hodari's motion to suppress. (J.A. 56, 94, 118, 130.)

On May 20, 1988, Hodari's contested jurisdictional hearing was held, and the juvenile court found the alleged violation of Health and Safety Code section 11350 to be true. (J.A. 94-111.)

On June 6, 1988, Hodari's dispositional hearing was held and the juvenile court ordered Hodari to a commitment at Los Cerros Camp. (J.A. 112-116, 122-124.)

On June 13, 1988, Hodari filed a timely notice of appeal. (J.A. 125.)

C. The State Appellate Opinion.

On December 15, 1989, the California Court of Appeal, First Appellate District, in a published opinion, reversed the judgment of the juvenile court. (J.A.

126-145.) The Court of Appeal found that the evidence offered in support of the petition had been obtained as the result of the illegal seizure of Hodari. (J.A. 143-144.) The Court of Appeal applied the definition of a seizure as set forth in *United States v. Mendenhall*, 446 U.S. 544 (1980) and *Michigan v. Chesternut*, 486 U.S. 567 (1988). (J.A. 132.) The Court of Appeal held that a reasonable person in Hodari's position would not feel free to leave, when confronted with Officer Pertoso's act of running directly at him.

> We have no doubt that it is coercive and intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk. Indeed, the sight of a running officer, even without a command to halt, would reasonably convince most citizens that they were not free to ignore the officer and leave . . . This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion as to cut him off and confront him head on. (J.A. 133-134.)

The Court of Appeal upheld the trial court's finding that the police officers had no reasonable grounds to detain him before he discarded the rock. (J.A. 138-140.) The Court of Appeal also found that the state conceded that issue. (J.A. 138.)

The Court of Appeal also disagreed with the juvenile court's ruling that Hodari's act of discarding the rock was not the "fruit" of Officer Pertoso's unlawful seizure.

> Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality.

> There were no intervening circumstances; the officer's stated purpose in pursuing appellant was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's acts were unfounded, as he admitted he originally saw nothing suspicious other than the four Black youths standing near a car. Appellant's act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence . . . To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction. (J.A. 142-143.)

The Court of Appeals held that the juvenile court erred in denying the motion to suppress, and had the wardship reversed. (J.A. 144.)

On March 15, 1990, the California Supreme Court denied the state's petition for review and ordered the opinion not to be published in the official reports. (J.A. 146.)

SUMMARY OF ARGUMENT

1. Petitioner, along with the Solicitor General and other amicus curiae, is seeking to change the law of search and seizure in this case. They desire that this Court impose a "bright-line" rule governing seizures in place of the test this Court has consistently used. In order for petitioner and Amici to effectuate such a change, and in order to argue that they are not really seeking a *change* in the law, they are forced to misread this Court's holdings in *Terry v. Ohio*, 392 U.S. 1 (1968), *United States v. Mendenhall*, 446 U.S. 544 (1980), *Michigan v. Chesternut*, 486 U.S. 567 (1988) and *Brower v. County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628 (1989). Indeed, they must give a patently incorrect reading of this Court's opinion in order to effectuate the major change in the law they wish to bring about.

Petitioner contends that no Fourth Amendment detention occurs unless there has been an actual physical restraint or termination of movement. Petitioner asserts that this position is not foreclosed by *Chesternut* and goes so far as to characterize it as "faithful" to the analysis of *Chesternut*. In fact, petitioner is advancing exactly the "bright-line" rule which this Court squarely rejected in *Chesternut*. There the Court refused to hold that no detention occurs until a fleeing individual stops in response to the police show of authority. Instead it adhered to its "traditional contextual approach," which looks to whether a reasonable person would have believed he was not free to leave.

Petitioner attempts to extract a physical restraint requirement from *Brower v. County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628, 1989. Yet, *Brower* was a civil rights case involving a fatal collision into the police roadblock. It has no bearing whatever upon the moment at which a police chase or cutting off of a suspect becomes a detention. Indeed, the issues posed in *Brower* are so different from those in chase or cut off cases such as this, the *Brower* opinion has no occasion even to refer to the Court's leading chase case, *Chesternut*.

This case simply represents one state court's application of the proper test – *Mendenhall-Chesternut* – to a particular set of facts. The Court of Appeal did not treat

any single fact as dispositive, but, viewing all the circumstances, concluded that a reasonable person in Hodari's position would not feel free to leave. Among other factors, the Court found that, in cutting off Hodari's path, and running directly at him from only 11 feet away, the police conduct here was substantially more coercive and intimidating than that involved in *Chesternut*.

Petitioner's criticisms and second-guessing of the Court of Appeal's characterization of the facts amount to no more than an invitation to this Court to micro-manage state courts' fact-specific applications of the *Mendenhall-Chesternut* standard. Yet, just last term, in another Fourth Amendment case, *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990), this Court stated that it would not disturb a state reviewing court's application of the proper constitutional standard to a particular set of facts. Since the Court of Appeal here applied the correct standard, *Mendenhall-Chesternut*, the same considerations of federalism underlying *Olson* call for a similar result here.

2. Petitioner also argues that evidence discarded at the very moment of an illegal seizure is, paradoxically, not a fruit of that illegality. Petitioner's analysis is flawed from the start. Petitioner erects a straw man: The state assumes that discarded contraband cannot be deemed the fruit of an illegal detention unless it can be said that an illegal search of the person would necessarily have followed the illegal detention. Petitioner then proceeds to analyze the discard issue on the basis of this odd premise. In fact, such speculation as to the likelihood of further illegal intrusions has no role in the analysis of whether evidence is a fruit of an illegal seizure. Instead, this Court's cases such as *Wong Sun v. United States*, 371 U.S.

471 (1963) and *Brown v. Illinois*, 442 U.S. 590 (1975) require an analysis of whether the evidence has been "come at" by "exploitation of the illegality" and whether there are any "intervening circumstances" severing the link between the illegality and the evidence.

Where an individual discards evidence at the very moment he is confronted by an illegal police show of authority or use of force, there clearly is no intervening circumstance purging the taint. In this situation, the evidence is obtained contemporaneously with and as a direct result of the illegal detention. There could be no more clear example of evidence come at by exploitation of the illegality.

Not surprisingly, state and federal cases throughout the country have recognized that contraband discarded during an illegal detention is a fruit of that illegality and is subject to the exclusionary rule. Indeed, to pretend otherwise, as the petitioner would have this Court do, would frustrate the deterrent purposes of the exclusionary rule. As the many cases on this subject reflect, it is quite predictable that an individual confronted with an illegal police detention would panic and discard contraband. However, the rule urged by the state would remove *all* these cases from the purview of the exclusionary rule. There would be no remedy for illegal police conduct which panics an individual into discarding evidence. With no remedy, there would be no deterrent, and the withdrawal of the exclusionary rule from these situations would effectively reward this form of illegal police conduct.

ARGUMENT

I

HODARI WAS SEIZED UNDER THE FOURTH AMENDMENT

This case concerns the limits of coercive police behavior under circumstances where the police concededly lack the reasonable suspicion basis necessary for an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1968).[1] Here, one of the police officers blocked Hodari's path and ran directly at him from a distance of 11 feet.

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[1] Two Amicus briefs (Brief Of The Appellate Committee Of The California District Attorneys Association and Brief For The United States) on behalf of petitioner are raising the issue of whether Hodari's flight from the police equates to a reasonable suspicion of wrongdoing.

This issue is not before the Court. The petitioner has conceded in the Court of Appeal that the police officers did not have a reasonable suspicion of any wrongdoing by Hodari. (J.A. 138.) Moreover, the petitioner did not raise this issue in his petition for certiorari.

The District Attorneys Association's brief states that "*Amicus* is mindful of the prohibition against presenting additional information in an *amicus curiae* brief. [Citations omitted.] However, it is the position of *amicus* that this prohibition does not apply in the instant case in that the issue of reasonable suspicion was discussed below and has been raised by the respondent in this Court." (District Attorneys Brief p. 5, n. 1.) The District Attorneys Association then cites to pp. 8-23 of Hodari's brief in opposition to the petition to certiorari. Pages 8-23 of Hodari's brief in opposition to the petition for certiorari is the *entire* argument section of the brief. Amici's citation is misleading and amici's assertion is patently untrue. This Court has refused to consider issues in *amicus curiae* that were not

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Not surprisingly, the Court of Appeal, applying the "reasonable person" standard dictated by *Michigan v. Chesternut*, 486 U.S. 567 (1988), concluded that, in view of all the circumstances, a reasonable person confronted by this police conduct would not feel he was free to leave and go on his way. On these facts, that conclusion is unassailable, so the state has concentrated on a different tack. The petitioner's main argument is that notwithstanding *Chesternut's* rejection of such a "bright-line" standard, there was not detention here since there had not yet been a "physical restraint" or "termination of

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raised in the Court of Appeal or in the petition for certiorari. In *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and numerous other cases, this Court refused to consider an argument raised by *amicus* since it was not raised by the parties below. *Id.* at p. 60, n.2. See also *Bell v. Wolfish*, 441 U.S. 520, 530, n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960); *Equal Employment Opportunity Commission v. Federal Labor Relations Auth.*, 476 U.S. 19 (1986); *DeShaney v. Winnebago County Dept. of Social Services*, ___ U.S. ___, 109 S.Ct. 998 (1989); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989).

The fact that Hodari fled when he saw the unmarked brown Dodge is of no consequence. As the state has not contested the insufficiency of that circumstance to constitute a reasonable suspicion, the question posed here concerns what type of police conduct is permissible when the information known to the police does not add up to a reasonable suspicion, specifically, a police cut off and block of a suspect in this fashion, even when they lack reasonable suspicion necessary for an investigative stop. The argument of whether the police can engage in this type of cutting off and blocking of a suspect when their information does not amount to reasonable suspicion necessary for a detention is not cognizable here.

movement" as of the instant Hodari discarded the contraband. (Of course, just seconds later, the officer did wrestle Hodari to the ground.) In any event, neither *Chesternut* nor the civil rights case on which petitioner relies, *Brower v. County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628 (1989), provides any support for petitioner's novel attempt to graft this additional requirement onto the detention test this Court settled in *Chesternut*.

A. Evolution of the *Mendenhall-Chesternut* Test.

The petitioner wants to use this case to unravel a standard that has its roots in *Terry v. Ohio*, 392 U.S. 1 (1968) and has evolved from decisions in *United States v. Mendenhall*, 446 U.S. 543 (1980), *Florida v. Royer*, 460 U.S. 491 (1983) and culminating in *Michigan v. Chesternut*, 486 U.S. 567 (1988) by saying that this standard is not the complete test in defining what is a Fourth Amendment seizure.

"It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. at 20.

In *United States v. Mendenhall*, 446 U.S. at 554 Justice Stewart writing for himself and then Justice Rehnquist, stated in the opinion, that a person is seized within the meaning of the Fourth Amendment, "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at p. 554 (fn. omitted). The Court provided the following examples of circumstances that might indicate

a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at p. 554.[2]

In *Florida v. Royer*, 469 U.S. 1 (1984), a plurality opinion applied the same test as *Mendenhall*. The Court later used the same test to analyze immigration officers' factory survey. *INS v. Delgado*, 466 U.S. 210, 215 (1984). And, in *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988), the full Court explicitly adopted the "reasonable person" test set forth in the *Mendenhall* opinion where the police followed the suspect.

This Court held that the appropriate test is whether a reasonable man, viewing the particular police conduct as a whole and within the setting of all the surrounding circumstances, would have concluded that the police had in some way restrained his liberty so that he was not free to leave. *Michigan v. Chesternut*, 486 U.S. at pp. 573-574.

In *Chesternut*, this Court continued that "The test is necessarily imprecise, because it is designed to assess the

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[2] Professor Wayne LaFave in describing the *Mendenhall* test has stated that "[A]n encounter becomes a seizure if the officer engages in conduct which a reasonable man would view as threatening or offensive even if performed by another private citizen. This would include such tactics as pursuing a person who has attempted to terminate the contact by departing, calling to such a person to halt, holding a person's identification papers or other property, *blocking the path of the suspect*, and encircling the suspect by many officers, in addition to the more obvious ones." 3 W. LaFave, Search and Seizure, pp. 413-414 (2d Ed. 1987). [Emphasis added.]

coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Id.* at p. 573. It is an objective test which is broad enough to apply "to the whole range of police conduct in an equally broad range of settings." *Id.* at p. 574.

Both the petitioner and the respondent in *Chesternut* argued for "bright-line" rules. In *Chesternut*, the respondent argued that "any and all police 'chases' are Fourth Amendment seizures." *Id.* at p. 572. The petitioner argued for a rule that "the Fourth Amendment is never implicated until an individual stops in response to the police show of authority." *Id.* at p. 572. *Chesternut* was a compromise between two competing "bright-line" rules. In *Chesternut*, this Court explicitly refused to fashion a "bright-line" rule applicable to all investigatory pursuits and stated, "[W]e adhere to our traditional contextual approach . . . " *Id.* at p. 573.

This Court did not rule that attempting to cut someone off and then blocking his path could not be sufficiently intimidating to constitute a detention. Since *Chesternut*, the test has not changed.

B. This Court Should Not Disturb The Court Of Appeal's Fact-Specific Application of *Chesternut*.

Under the *Mendenhall-Chesternut* case-by-case approach, it is to be expected that in some circumstances aggressive police conduct resulting in a cutting off and a blocking of the suspect's path, will constitute sufficient force or show of authority that a reasonable person

would not feel free to leave.[3] Consistent with the analysis prescribed by *Chesternut*, the Court of Appeal here did not treat any single factor as dispositive, but looked to the totality of the circumstances. Here, in the words of the Court of Appeal, Hodari was caught in a police "pincer maneuver." (J.A. 133.) One police officer pursued Hodari and, more importantly, another officer drove around the block in the opposite direction in anticipation of stopping Hodari. (J.A. 36, 41.) In *Chesternut*, the suspect ran when he saw the police. The police did not activate a siren or flashers nor did they operate the car in an aggressive manner or attempt to block or control the suspect's movement. *Id.* at pp. 574-575. The officers merely *followed* him in an effort "to see where he was going." *Id.* at p. 569. [Emphasis added.]

Moreover, after Hodari left the red car, Hodari apparently knew the police were after him.[4] It is reasonable to assume that, when Hodari saw the officer running toward him, he understood that the officer was connected

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[3] Indeed, Professor Wayne LaFave has suggested that an implicit show of force is present whenever a police officer confronts a citizen. 3 W. LaFave, Search and Seizure, section 9.2(h), p. 410, (2d Ed. 1987). However, no such broad interpretation is necessary to explain the Court of Appeal's conclusion here that the police conduct was sufficiently aggressive and intimidating to convince a reasonable person that he was not free to leave.

[4] The record here will support the inference that whether Hodari saw "POLICE" emblazoned on the jackets of the occupants of the brown Dodge or not, Hodari knew the brown Dodge was an unmarked police car and the occupants were officers before he fled. Otherwise, it is reasonable to assume Hodari and his companions would have continued their conversation at the red car or just walked away when the brown Dodge approached.

to the brown Dodge he had seen moments earlier. This was clearly not a situation where a police officer was running down the street in someone's "general direction" on a benign mission, and the petitioner's speculation, in that regard, is contrary to the facts of this case. (Petitioner's Brief pp. 27, 30.) Taking a course intended to "cut someone off and then charging directly at that person and blocking his path is different that running in someone's "general direction." Indeed, petitioner's characterization of the facts is yet another attempt to have this Court disregard the Court of Appeal's view of the facts and consider the whole case anew – an approach completely contrary to the more deferential standard this Court applied last year in *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990). Clearly, Officer Pertoso's attention was directed toward Hodari. Indeed, he embarked on a course to cut him off. There was no mere surveillance or scrutiny as in *Chesternut*, nor was there any invitation to suggest a consensual encounter. The officer was blocking Hodari's path; he was running directly toward Hodari. It follows that he had a reasonable belief that his freedom of movement was being restricted.

A reasonable person could hardly characterize Officer Pertoso's blocking of Hodari's path as a consensual encounter. *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982) ["[B]locking an individual's path or otherwise intercepting him to prevent his progress is a consideration of great and probably decisive, significance."]; *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980); *Lopez v. New Mexico*, 783 P.2d 479 (N.M.App. 1989).[5]

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[5] *People v. Manon*, 435 Mich. 1, 457 N.W.2d 623 (1990) which petitioner cites at several points, provides stark contrast

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As the Court of Appeal here stated "This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion *as to cut him off and confront him head on*. Under the rationale of *Chesternut*, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or 'otherwise control the direction or speed' of one's movement." [Emphasis added.] (J.A. 134.) The Court of Appeal, also noted that the "facts of the instant case illustrate a situation tantamount to a physical seizure. Appellant, who was running down the sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a

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to the facts of this case. Factually, *Manon* was practically a clone of *Chesternut* itself. The police simply followed a running suspect on foot. They did not attempt to block his path. "[T]hey never attempted to force the defendant to run in a direction other than the one chosen by him. . . ." *Id.* 435 Mich. at p. 12, 457 N.W.2d at 627. The only difference between the facts of *Chesternut* and those of *Manon* was that in the former the police followed in a car and in the latter they did so on foot. Consistent with *Chesternut's* refusal to replace the "reasonable person" test with a set of mechanical rules, the Michigan court concluded that this distinction, by itself, was insufficient to transform the police conduct into a detention. "Put simply, the police never exhibited any show of authority which would indicate to a reasonable person that he was not free to leave." *Id.* 435 Mich. p. 12, 457 N.W.2d at 628. Far from calling into question the soundness of *Hodari D.* or similar state cases (such as *Lemmon*), *Manon* demonstrates simply that the *Chesternut* test works. State courts are quite able to distinguish between police conduct which effectively restrains a person's freedom to leave and police conduct which does not.

jacket marked 'police,' who was 11 feet away and running toward him." (J.A. 137, n.4.)

After cutting him off, Officer Pertoso, intent on stopping Hodari, ran directly at Hodari to block his path. (J.A. 44.) In *Chesternut*, there were no actions by the police officers to control the direction of the suspect or to block his path.

Despite the lack of precedent, the petitioner and the Solicitor General are asking this Court to repudiate its holding just two-and-a-half years ago in *Chesternut*. The petitioner cites *Brower v. County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628, 635 (1989) for the proposition that in order for there to be a Fourth Amendment seizure there must be "a termination of movement through means intentionally applied" thereby establishing a new prong to the *Mendenhall-Royer-Chesternut* reasonable person test. The petitioner has not cited any case that has adopted the use of *Brower* to establish this new prong.

Since this is an objective test, Hodari was detained before he was physically wrestled to the ground by Officer Pertoso because a reasonable person in his position would not have felt free to leave.

By not recognizing certain police conduct, i.e., running in a manner to cut someone off and then charging at him in an effort to block his path, the petitioner's position would allow just the kind of coercive police conduct (harassment without reasonable suspicion) that *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny intended to prevent. Officer Pertoso's blocking of Hodari's path was

considerably more than a benign police – citizen encounter. *Hawkins v. State*, 255 Tex.Cr.App., 758 S.W.2d 255 (1988).

Thus, the approach taken by the California Court of Appeal in *Hodari D.* is consistent with the approach taken by courts in other states, i.e., each case is decided on a fact by fact basis. *Lopez v. New Mexico*, 783 P.2d 479 (N.M.App. 1989); *State v. Lemmon*, 568 A.2d (Md. 1990). Here, the proper legal standard is that set forth in *United States v. Mendenhall*, 446 U.S. 544 (1980) and followed in *Michigan v. Chesternut*, 486 U.S. 567 (1988) and the Court of Appeal in *Hodari D.* applied the proper legal standard.

As a very recent opinion of this Court indicates, under these circumstances, a state appellate court's fact-specific application of the proper constitutional standard is entitled to some degree of deference.

In *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990) a Fourth Amendment case, this Court found that the Minnesota Supreme Court applied the correct standard in determining whether exigent circumstances existed when a defendant was arrested in his house without a warrant. This Court said, "We are not inclined to disagree with this fact-specific application of the proper legal standard." *Id* at p. 1690.

Deference should be given to the Court of Appeal here just as this Court did in *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990). Because the Court of Appeal

applied the proper standard to a fact-specific situation, this Court should decline to disturb the Court of Appeal's application of the reasonable person standard just as it did in *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990).[6]

The rationale of *Minnesota v. Olson* is equally applicable to this case. *Olson* reflects this Court's recognition that, where it has spelled out the legal standard governing a particular Fourth Amendment issue, state courts can generally be trusted to administer that standard. In *Chesternut*, this Court made clear that the *Mendenhall* "reasonable person" test provided the proper framework for assessing whether police conduct was sufficiently intimidating to constitute a detention. In its discussion, it also identified several factors relevant to this determination, such as whether the police blocked or controlled the direction of the suspect. In its opinion, the state appellate court thoughtfully applied the *Chesternut* analysis to the facts before it, drawing extensively from the discussion in *Chesternut*. Throughout its brief, petitioner basically asks this Court to reweigh the circumstances and substitute its conclusions for those of the state court. As *Olson* reflects, that is not this Court's role. The Court of Appeal's conclusion that Hodari was not free to leave was a reasonable one, and this Court should not disturb it.

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[6] Justice Kennedy's concurring opinion emphasized that in deferring to the state court's application of the proper standard to a particular set of facts, the Supreme Court was not necessarily endorsing that application.

C. *Chesternut* Remains The Proper Test, And There Is No Additional Requirement of Physical Restraint.

Despite the Court of Appeal's proper application of the *Mendenhall-Chesternut* standard, the petitioner wants to replace the standard that has evolved by saying that this standard is not the complete test in defining a seizure under the Fourth Amendment. Petitioner contends that *Mendenhall* and *Chesternut* do not state the complete test for a seizure, but "*[M]endenhall* explicates only the requirement of a show of authority, defining it as official conduct which would cause a reasonable person to believe that he is not free to leave." (Petitioner's Brief p. 17.) Petitioner wants this court to add the requirement that there be a "physical restraint" on the suspect.

In so arguing, the petitioner and the Solicitor General assert that in order for there to be a Fourth Amendment seizure there must be "a termination of movement through means intentionally applied" thereby establishing a new prong to the *Mendenhall-Royer-Chesternut* reasonable person test. The petitioner and Solicitor General are asking this Court to repudiate its holding just two-and-a-half years ago in *Chesternut*.

In *Chesternut*, this Court explicitly declined to adopt the rule that the petitioner is urging now, i.e. an inflexible rule on what constitutes a seizure of a fleeing individual, that is, a physical restraint rule. Instead, *Chesternut* established a fact oriented test.

The petitioner and the Solicitor General are flatly wrong in their assertions that *Chesternut* did not address whether physical restraint or termination of movement is

a prerequisite for recognition of a detention. This is exactly the position which the state of Michigan advanced in *Chesternut:* "Petitioner argues that the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority. Thus, petitioner would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." *Id.* at p. 572.

The court in *Chesternut* did not merely find it unnecessary to consider this question, as petitioner now suggests. *Chesternut* addressed and squarely rejected the proposition.

The test originally articulated by Justice Stewart in *Mendenhall* and adopted by the full Court in *Chesternut* finds its roots in *Terry v. Ohio*, 392 U.S. 1 (1968) and its many progeny. Both petitioner and the Solicitor General attempt to invoke *Terry*, but fail to recognize the significance of the very language they cite: "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." 392 U.S. at 19 n. 16 (Quoted in United States Brief at p. 13). Yet, it is obvious that restraint on a citizen's liberty may occur, before he is actually brought to a halt.[7]

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[7] Much the same can be said about language quoted by the Solicitor General in from a 19th century maritime case: "The parties must understand that they are dispossessed, and they are no longer at liberty to exercise any dominion on board of

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Indeed, this recognition underlies the *Mendenhall-Chesternut* test: where the police, through force or a show of authority, communicate to a reasonable person that he is not free to leave, his liberty is restrained as of that moment. Petitioner makes the same mistake in declaring, "We can discover no case in which this Court has found a seizure in the absence of termination of freedom of movement, either through the use of force or display of authority." (Petitioner's Brief pp. 18-19.) But, petitioner is urging more than a "freedom of movement" standard. Petitioner would replace the current "contextual" examination of whether the individual's freedom has been restrained, with a mechanical inquiry into whether and when the individual was *physically* restrained or came to a standstill.

Although *Chesternut* explicitly rejected a "bright-line" physical restraint test of the type urged by the petitioner, petitioner nonetheless suggests the Court adopted just such a test in *Brower v. County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628 (1989). *Brower* was a wrongful death/civil rights suit arising out of a fatal collision into a police roadblock. Thus, it involved an actual physical termination of movement of the most dramatic kind. Unlike *Chesternut* and this case, it did not involve any ambiguities as to the moment at which a Fourth Amendment seizure occurs. Instead, the *Brower* opinion simply

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the ship." *The Josefa Segunda*, 23 U.S. (10 Wheat.) 312, 325 (1825) (Quoted in United States Brief at pp. 11-12). Just like the *Mendenhall-Chesternut* standard, this quote focuses upon whether the official conduct communicated to the other party that he was not free to control the ship.

explicated the requirement that only *willful* police conduct will effect a Fourth Amendment seizure. *Brower v. County of Inyo*, 103 L.Ed.2d at p. 635.

Petitioner appears to believe that this Court in *Brower* was rewriting the law of search and seizure by sleight of hand. It is wholly unreasonable to suggest that this Court used a civil rights case involving unrelated issues to make, in dictum, so fundamental a change in the detention standard. It is even less plausible to believe the Court would effect such a change without referring to or discussing a single case which it was modifying, clarifying or repudiating. Having refused the previous year in *Chesternut* to adopt a physical restraint rule, the Court certainly did not intend to repudiate *Chesternut* sub silentio in a case not even posing the issue.

The petitioner has not cited any case that has adopted its anomalous interpretation of *Brower* to establish this new "physical restraint" prong. In fact, state courts have rejected the notion that Brower modified or changed the holding in *Chesternut*. In *State v. Lemmon*, 568 A.2d 48 (Md. 1990) police officers chased Lemmon on foot and with a police car in an attempt to cut Lemmon off. The court rejected any notion that no seizure takes place until the restraining effect of a police command actually occurs, i.e., when the person is within the police officer's physical control. The Court of Appeal went on to say "[W]e believe that *Brower* is in no way inconsistent with *Chesternut* and leaves *Chesternut* intact in all material aspects." *Id.* at p. 574. Similarly, in *Lopez v. New Mexico*, 783 P.2d 479 (N.M.App. 1989), police officers used their van to block a suspect's vehicle. *Lopez* read *Brower* as

consistent with the principle that "[B]locking a subject's vehicle is a form of physical restraint." *Id.* at p. 482.[8]

The analysis of this same issue by petitioner in another very recent California case reveals the hazards of the state's physical restraint test. In *People v. Verin*, 220 Cal.App.3d 551, 269 Cal.Rptr. 573 (1990), the California Attorney General, relying on the same interpretation of *Brower* advanced here, argued that there was no detention because, rather than freeze immediately, the defendant had taken two steps forward after being ordered to halt. The state court concluded that the *Brower* dictum merely referred to the willfulness of the police conduct and was not intended to establish a termination of movement requirement.

The state's argument failed in *Verin*, just as it should here. Nonetheless, the facts of *Verin* demonstrate the pitfalls of the state's argument here. First, a physical restraint rule would not provide the workable, easily administered, "bright-line" rule which the state promises. There would still be endless litigation over whether a suspect has come to a complete stop or otherwise manifested his acquiescence in the seizure. Further, such a rule certainly will not serve the purposes of the Fourth

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[8] Similarly, of course, numerous earlier cases have held that physical restraint is not required for a detention. (See *Swicegood v. State*, 448 So.2d 433 (Ala.Cr.App. 1983), *People v. Thomas*, 660 P.2d 1272 (Colo. 1983), and *People v. Washington*, 192 Cal.App.3rd 1120, 238 Cal.Rptr. 840 (1987), [abandoned contraband was suppressed in each case because of police chases held to constitute illegal detentions]).

Amendment since it will shift the inquiry from the behavior of the police – the core concern of the Amendment – to the subjective reactions of a particular suspect. This is the very reason the Court in *Chesternut* eschewed such a test and adhered to the traditional "objective" formulation. As this Court stated in *Chesternut*,

> The test's objective standard – looking to the reasonable man's interpretation of the conduct in question – allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. 3 W. LaFave, Search and Seizure section 9.2(h), pp. 407-408 (2d ed. 1987 and 1988 Supp). This reasonable person standard also ensures that the scope of Fourth Amendment protections does not vary with the state of mind of the particular individual being approached. 486 U.S. at 574.[9]

The Petitioner and Solicitor General appear to disagree over the importance of this case. The Solicitor General suggests that very few cases will be affected by this Court's decision. Petitioner, however, is correct in believing otherwise. Petitioner describes this as a scenario which occurs almost daily on the streets of our nation's cities. (Petitioner's Brief p. 9.) The proliferation of lower

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[9] Professor Wayne LaFave, states that "The 'free to leave' concept, in other words, has nothing to do with a particular suspect's choice to flee rather than to submit or with his assessment of the probability of successful flight. Were it otherwise, police would be encouraged to utilize a very threatening but sufficiently slow chase as an evidence-gathering technique whenever they lack even the reasonable suspicion needed for a *Terry* stop." 3 W. LaFave, Search and Seizure, (1990 Supp.) section 9.2, page 39.

court cases involving permutations of the chase-and-discard sequence appears to confirm this assertion. Yet, the very frequency with which these "chases" occur should be further cause for rejection of petitioner's proposed standard.

It bears emphasis that the question of whether a particular pursuit constituted an illegal detention will only arise in those cases in which the police *lack* a reasonable suspicion basis for such a detention. As the cases reflect, it is quite common for police action such as this to panic the individual into discarding evidence.[10] (See *Swicegood v. State*, 448 So.2d 433 (Ala.Cr.App. 1983), *People v. Thomas*, 660 P.2d 1272 (Colo. 1983), and *People v. Washington*, 192 Cap.App.3rd 1120, 238 Cal.Rptr. 840 (1987), [abandoned contraband was suppressed in each case because of police chases held to constitute illegal detentions]).

Yet, petitioner would remove *all* such cut-off maneuvers like this one here from the purview of the Fourth

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[10] One commentator has characterized this scenario as follows: "If, however, the officer, without benefit of probable cause, and acting strictly on a 'hunch,' or because of suspicion based upon personal knowledge or hearsay, decides to follow the individual, and proceeds to hound him in a harassing manner, hoping that the individual will panic in the belief that he had better 'ditch the stuff' before there is a shakedown, then an issue of major constitutional proportions will arise." E. Mascolo, The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis, 20 Buff.L.Rev. 416, 417 (1971).

Amendment – including those sufficiently intimidating to meet the *Mendenhall-Chesternut* test.[11]

The lesson of this Court's Fourth Amendment jurisprudence is that, unless they possess an objective reasonable suspicion, the police may not engage in conduct which would communicate to a reasonable person that he is not free to leave. A physical restraint test, however, would effectively reward such conduct in the very common situation in which the individual discards evidence after his freedom has been restrained but before he actually comes to a halt.

The opinion in *Brower* gave no indication that this Court was re-writing Fourth Amendment law. *Brower* did not even mention *Mendenhall* or *Chesternut*. Instead, following-up on its decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), *Brower* simply held that an individual who collided into a police roadblock had been seized within the meaning of the Fourth Amendment since the police conduct had been willful. Moreover, the *Brower* opinion never suggested that its discussion of the seizure there was intended to modify, replace, or supplant the definition in *Chesternut*.

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[11] Thus, it is unclear why petitioner feels that a major change to a "bright-line" rule is needed for these cases. Petitioner's fears that the existing *Chesternut* test is insufficient are unfounded. The *Chesternut-Mendenhall* approach will *not* affect lawful police behavior. The police may follow any individual as long as their actions are not so intimidating that a reasonable person would feel his liberty was restrained. Further, if the police have reasonable suspicion, they may chase and detain any person. Thus *only* coercive police actions taken without reasonable suspicion will be deterred under the existing tests.

In *Chesternut*, this Court had an opportunity to adopt the inflexible requirement of a physical restraint rule that the petitioner puts forth and declined to do so. It is ridiculous for petitioner to suggest that in a case (*Brower* was a civil rights case) not dealing with the seizure issue in a criminal law context, this Court meant to re-write Fourth Amendment law with respect to detentions and do away with the reasonable person test set forth in *Mendenhall* and followed in *Chesternut*.

The majority opinion in *Chesternut* provides the analytical framework for the kind of issue presented here.

There is inherent danger in suggesting that by adding a physical restraint requirement to the *Mendenhall-Chesternut* test, the police and the lower courts will have a test that is easy to apply. Unfortunately, citizen-police encounters are amorphous, and a physical restraint rule will not be a panacea for the police or the lower courts. For example, how much physical restraint is necessary to implicate the protection of the Fourth Amendment? The danger to the suspect and the police officer is apparent in the process of applying the physical restraint. Also, what if a police officer approaches a citizen and turns on his siren, draws his weapon, or shoots over the head of someone and that person continues to flee? It appears that this police conduct would not constitute a seizure. Can the police be trusted with this much discretion?[12] As one can see, the possible scenarios are numerous.

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[12] One commentator has suggested that this area is better off left unexplored. M. Tracy Maclin, The Decline Of The Right Of Locomotion: The Fourth Amendment On The Streets, 75 Cornell L.Rev. 1313 (1990)

Petitioner's test would be unworkable and, most important, would disserve the purposes of the Fourth Amendment. That amendment is directed to police conduct. Its purpose is " 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " *INS v. Delgado*, 466 U.S. at 215, quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 544 (1976). However, petitioner's formula would effectively replace scrutiny of the police conduct with a mechanistic inquiry into the individual suspect's subjective response to the police conduct. Incongruously, intimidating police conduct, not supported by a reasonable suspicion – conduct which would convince a reasonable person he was not free to leave – would be legal up to the moment the suspect actually was physically apprehended. Thus, the legality of the police conduct would depend upon how the individual later responded to it.

As the cases in this area demonstrate, evidence is often obtained during that narrow interval between the police use of force or show of authority and the individual's physical apprehension. Petitioner proposes to take all such cases out of the Fourth Amendment – despite the fact that, when the police engaged in the coercive conduct, they had no reasonable basis under *Terry* for doing so.

There is no telling just how often police officers rush, block off or aggressively pursue individuals in the manner involved here, despite the lack of a reasonable suspicion – it is only the incidents which produce evidence which wind up in court. However, the frequency with which such issues arise in criminal cases throughout the country suggest it is a frequent police practice. In many

cases – and certainly in this one – the police conduct is sufficiently restraining that a reasonable person would not feel free to leave. However, if petitioner's test is adopted, there will be no remedy and thus no deterrent for such behavior, for the Fourth Amendment will not be implicated unless and until there is a physical restraint or actual termination of movement.

In *Terry* and again in *Chesternut*, this Court refused to dilute the protections of the Fourth Amendment with so artificial and formalistic an interpretation of its proscription against unreasonable searches and seizures. "In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the police upon personal security . . . " *Terry, supra*, 392 at p. 18 n. 15. Most significantly, in *Chesternut*, the Court recognized that a "bright-line" rule such as the state urges would leave unchecked "police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." *Chesternut*, 486 U.S. at p. 572.

California, as petitioner here, is simply recycling the same argument advanced by Michigan in *Chesternut*. Petitioner offers no compelling reason for this Court to repudiate the "traditional contexutal approach" which it embraced so clearly in *Chesternut*. Certainly, *Brower*, a wrongful death case bearing no resemblance to detention cases like this, does not supplant the *Chesternut* test. Since the state court here applied the proper *Chesternut* standard in view of all the circumstances surrounding the incident, this Court should accord it the same deference as in *Minnesota v. Olson* and affirm the judgment.

Court of Appeals's conclusion that Royer was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and ineffective to justify the search." *Id.* at pp. 507-508.

Unquestionably, all the *Brown* factors support the Court of Appeal's determination here that the causal link was not severed. Hodari's discarding of the rock was *contemporaneous* with the police conduct which effected the illegal seizure – he discarded the rock immediately upon seeing the officer running straight at him from only a few feet away. For the same reason, there could be no intervening circumstances purging the taint. Again, *Brown* and its progeny are instructive. In *Brown* and *Dunaway*, there were 2-hour intervals between the illegal seizures and the confessions and the respective defendants were advised of and waived their *Miranda* rights. Yet, in each case, the Court found the state had failed to sustain its burden of establishing that the defendant's statement was sufficiently a product of free will to break the causal connection.

In *Taylor*, this Court found unpersuasive the state's argument that the defendant had every opportunity to reflect upon his situation and consider his options and that his statement therefore reflected an exercise of free will. *Taylor v. Alabama*, 457 U.S. at p. 687. Petitioner's argument here – asserting that Hodari freely made the choice to abandon the rock as an act of "self-help" – is simply a retread of the argument rejected in *Taylor*, and an implausible one at that. If a defendant's properly *Mirandized* statement is not sufficiently a "product of free will" to purge the taint of an illegal seizure two hours

earlier, then surely neither is a minor's startled instantaneous response to a police officer cutting him off and running right at him.

Petitioner's position is all the more difficult to sustain in light of applicable burden and standard of review. Under *Brown* and its progeny, the burden was squarely on the state to establish that the discarded evidence was not tainted by the contemporaneous Fourth Amendment violation. *Brown v. Illinois*, 422 U.S. at p. 504. Here, the Court of Appeal, carefully reviewing each of the *Brown* factors, concluded that the state had not sustained its burden. Moreover, on the detention issue discussed in Part I, *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990) should guide this Court's review. The Court should be very reluctant to disturb the state court's fact-specific application of the correct legal standard (*Brown*) to a particular set of circumstances.

In *Brown* and its subsequent cases, the Court has placed greatest emphasis on the final factor, "the purpose and flagrancy of the official misconduct." As discussed and confirmed by the many state cases on this subject elsewhere in this brief, it is quite common for an individual confronted by a police force or show of authority to attempt to discard incriminating evidence. This is not an unexpected bonus; it is an entirely foreseeable outcome of this type of detention.

Here, the police pursued Hodari, cut off his path, and ran head-on at him – even though they had no reasonable suspicion basis to detain him. Again, this Court's observations in *Brown* are apropos: Clearly, the police "embarked upon this expedition for evidence in hope

something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright and confusion." *Id.* at p. 590. So too, Hodari was quite predictably, "startled" at the sight of the officer rushing at him and panicked. (J.A. 46.)

The close causal connection between the illegal conduct and the acquisition of the evidence bears upon the final *Brown* factor, the flagrancy of the misconduct, as well as on the temporal proximity and intervening circumstances factors. "When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but also use of the evidence is more likely to compromise the integrity of the courts." *Dunaway v. New York*, 442 U.S. at 218.

Not surprisingly, the petitioner and the Solicitor General devote little discussion to the impact of this case on the deterrent purposes of the exclusionary rule. As the many lower court cases cited in the brief demonstrate, the detention-and-discard scenario is a very common one. It is not limited to cases in which police pursue or block the path of a suspect. It also recurs during other types of detentions, such as when an officer verbally commands a suspect to stop. E.g. *People v. Verin*, 220 Cal.App.3d 551, 269 Cal.Rptr. 573 (1990). In *Hawkins v. State*, 758 S.W.2d 255, 259, (Tex.Cr.App. 1988), the Texas Court of Criminal Appeals surveyed decisions on this subject from various other states and concluded: "These cases . . . make it clear that if an accused abandons property in response to unlawful police misconduct, the abandonment will not be

considered a voluntary or independent act and thus the protections of the Fourth Amendment will apply."

Cases throughout the United States reflect that it is not uncommon for a suspect confronted with kind of show of authority present here to throw down contraband that he happens to have. *Hawkins v. State*, 758 S.W.2d 255 (Tex.Cr.App. 1988); *People v. McFadden*, 524 N.Y.S.2d 902 (A.D. 1988); *Moss v. Commonwealth*, 373 S.E.2d 170 (Va.App. 1983); *Settle v. State*, 679 S.W.2d 10 (Mo.App. 1984); *United States v. Beck*, 602 F.2d 726, (5th Cir. 1979), [An abandonment that is the product of police misconduct is not voluntary and cannot, therefore, vitiate the taint of an illegal detention.]; *People v. Menifee*, 100 Cal.App.3d 235, 160 Cal.Rptr. 682 (1979); *People v. Washington*, 192 Cal.App.3d 235, 160 Cal.Rptr. 682 (1979); *Commonwealth v. Barnett*, 484 Pa. 211, 398 So.2d 1019 (1979); *Commonwealth v. Jeffries*, 454 Pa. 320, 311 A.2d 914 (1973). [In the cases cited, each court found an involuntary abandonment of contraband as a result of police misconduct.]

The petitioner does not and cannot claim that the cases throughout the country are in a state of disarray on the abandonment of contraband because it is quite foreseeable that a defendant faced with an illegal detention will try to discard contraband. On the contrary, both federal and state decisions recognize that evidence thrown down or discarded upon an illegal detention is not a voluntary abandonment as petitioner claims. This kind of scenario must be policed by the Fourth Amendment. The link between these two events, i.e., the illegal detention and the discarding is a close and recurring one and that is why a common sense approach must be taken

and say that the abandonment is the fruit of the illegal act.

This does not mean that a defendant can "immunize" himself every time he sees a police officer approaching as petitioner would have this court believe. Petitioner claims that the Court of Appeal has created a new constitutional right in that it gives a suspect a right to a "preemptive form of self-help" whereby "the right of person who fears detention by a police officer [can] immunize himself from prosecution by discarding incriminating evidence on his person." (Petitioner's Brief p. 60.) It has done nothing of the sort. Discarded evidence will only be subject to suppression where (1) the police lacked a reasonable suspicion but (2) nonetheless engage in a use of force or show of authority which would communicate to a reasonable person that he was not free to leave. Where the police merely approach or follow an individual without restraining his freedom to leave, as in *Chesternut*, there has been no illegal detention and the exclusionary rule does not come into play. Similarly, where the police have reasonable grounds to detain someone and he precipitously discards the contraband, the evidence poses no Fourth Amendment problem. Discarded evidence will be subject to suppression only if the police have acted illegally by engaging in coercive conduct, when they lack the basis for a detention.

Here, the object of the officers' pursuit and cutting off of Hodari was the acquisition of evidence. The officers wanted to stop these young men, to find out who they were, and to find out what they were about. What occurred was exactly what Officer Pertoso and Officer McGoglin hoped would occur. They had a hunch about

this group of young Black men. And, they hoped their actions would provoke Hodari into a panic thereby inculpating himself – that is exactly what happened. And, since the officers lacked a reasonable suspicion basis for such conduct, that is exactly what the exclusionary rule is designed to prevent.

This was not a fortuitous windfall. This is exactly what the police officers would expect to come out of this scenario.

In the Fourth Amendment context, quite simply, the assumption that the officer must intend to conduct a search for evidence is wrong. This is a case of police misconduct panicking Hodari into abandoning contraband. One commentator has stated that "In the real world, few people are aware of their Fourth Amendment rights, many individuals are fearful of the police, and police officers know how to exploit that fear. M. Tracy Maclin, The Decline Of The Right Of Locomotion: The Fourth Amendment On The Streets, 75 Cornell L.Rev. 1301 (1990), citing Professor H. Richard Uviller, *Tempered Zeal* (1988) at p. 16. Another commentator has characterized this scenario as follows:

> Since the individual cannot possibly know in advance how far the officer will go, he has no way of gauging a prudent course. If the officer continues to close in, the individual has to anticipate a search. To do nothing means certain discovery. To attempt a discard [90] is to invite a retrieve, thereby giving the officer probable cause to arrest.

Fn. 90: Undoubtedly, some individuals will opt in favor of discard, in the mistaken belief that they will not be prosecuted for a possessory offense if the goods are not discovered in the Law of search and seizure. E. Mascolo, The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis, 20 Buff.L.Rev. 416, 417 (1971).

Petitioner cites *Brower v. Inyo County*, ___ U.S. ___, 103 L.Ed.2d 628 (1989) as "compelling" authority for the proposition that "[T]he officer must intend to conduct a search for evidence." (Petitioner's Brief pg. 51.) However, the facts in *Brower*, a fatal collision into a roadblock, did not even remotely involve any issue with respect to abandonment or intent to search for evidence.

Brower cited *Hester v. United States*, 265 U.S. 57 (1924) to illustrate its holding that only *willful* police conduct implicates the Fourth Amendment. *Brower v. County of Inyo*, 103 L.Ed.2d at p. 635. *Hester* was a three paragraph opinion without much discussion. In *Hester*, revenue officers entered into an open field and gave chase after two moonshiners who dropped their whiskey bottles at the sight of the officers. The bottles were seized by the revenue officers. The *Hester* court specifically stated that it was deciding the case on the "open fields" doctrine: "The distinction between the latter [open fields] and the house is as old as the common law." *Id.* at p. 58. Therefore, there was no Fourth Amendment protection in the open field. Thus, in *Hester* there was no Fourth Amendment violation in the first place. *Hester* antedates most of this Court's jurisprudence on the 4th Amendment. In particular, *Hester* was decided prior to any of this Court's development of the fruits of the poisonous tree under *Wong Sun v.*

United States, 371 U.S. 471 (1963) and cases like *United States v. Crews*, 445 U.S. 463 (1980). Thus, *Hester* had no occasion to consider the "fruits" doctrine. This Court's citation of *Hester* to show the requirement of willful police conduct certainly does not mean that this Court intended to supplant, with a citation to a 1924 case, all the Fourth Amendment jurisprudence that has been developed in the past through *Wong Sun*, *Brown*, and their progeny.

Brower, a civil rights wrongful death case, involved no issue of the "fruits" of a Fourth Amendment violation and therefore it has no bearing on the fruit of the poisonous tree. "The *Brower* majority merely says that in *Hester* the police action did not constitute a seizure of the bottles, a conclusion which casts no doubt upon the proposition I have stated above: that in a *Hester*-type situation the police acquisition of the bottles may constitute the fruit of an earlier manifested police attempt to seize a person.[Fn.]" (3 W. LaFave, Search & Seizure (1990 Supp.) section 9.2 at p. 40.) It is one thing to say that when a fleeing suspect abandons contraband, the police have not "seized" the contraband. However, that does not preclude the possibility, as discussed by LaFave, that the contraband may nonetheless be a fruit of the seizure of the individuals. Indeed, the fruits of an illegal seizure may include many kinds of evidence such as a confession or identification, which, strictly speaking, have not been seized.

The exclusionary rule comes into play if and only if the police conduct is so restraining that a reasonable person would not feel free to leave. Hence, just as in

Chesternut, the usual police approach of a citizen will have no such effect, so there is no danger that abandoned property will be suppressed where the police have done nothing illegal. Conversely, however, where the police have illegally detained someone, the fruits of that detention must be determined under the test of *Brown*, *Dunaway*, and their progeny and not *Brower*.

In *Hodari D.*, the discarding of contraband was contemporaneous with the illegal police conduct of seizing Hodari. The only real difference between this case and the *Brown* line of cases is that the latter involved what suspects verbally divulged after the seizure. Thus, here the case for suppression is even stronger than in cases like *Brown* because the link between the illegality and the evidence is still tighter.

Chesternut indicates that the exclusionary rule will have no application where an officer merely approaches a defendant or engages in a conversation or otherwise initiates a consensual encounter. In other words, it has no application where the officer does not detain the suspect. Only when a police officer illegally restrains a defendant under the *Mendenhall-Chesternut* test does the exclusionary rule come into play at all. The situation in which a police officer either by force or a show of authority communicates to a person that he is not free to leave despite the lack of a reasonable suspicion is precisely the kind of situation that should be covered by the exclusionary rule.

The petitioner's position would undermine the deterrent effect of the exclusionary rule. As the proliferation of state abandonment cases illustrates – this is a common scenario. The issue only arises when the initial police

conduct, the detention, is illegal. Yet, to adopt petitioner's proposed rule, would reward such conduct.

The purpose of the exclusionary rule is to deter the kind of police misconduct that is illustrated by this case. The exclusionary rule would be meaningless if it allowed police officers to harass people without reasonable suspicion and any contraband that was dropped in an illegal encounter could then come in on the theory that the act that revealed it was voluntary even if the detention was not.

"Abandonment" analysis make sense where the act is wholly voluntary and not induced by police illegality. It is a far different matter where an individual discards contraband at the very moment of and in direct response to an illegal detention. All the factors the Court has found relevant in other "fruits" situations – temporal proximity, lack of intervening circumstances, the nature of the official misconduct – militate in favor of the conclusion reached by many state and federal courts which have considered the subject. Such discarded property is just as much a fruit of an illegal detention as a statement (as in the *Brown* cases) or a consent (as in Royer). Indeed, the case for suppression of such evidence is even stronger than in those cases because a panicked response to an illegal police use of force or show of authority is even less voluntary than a consent or *Mirandized* statement given later in the course of a detention.

The Court of Appeal put it succinctly, "To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction." (J.A. 143.) Since

the evidence in *Hodari D.* was abandoned contemporaneously with an illegal seizure the Fourth Amendment exclusionary rule came into play. The California Court of Appeal followed *Brown* and its progeny and took a common sense approach applying the *Mendenhall-Chesternut* test to a fact-specific situation. There was ample support for the Court of Appeal's finding that the contraband was the fruit of the illegal detention, and its decision should not be disturbed.

CONCLUSION

The judgment of the California Court of Appeal for the First Appellate District should be affirmed.

Respectfully submitted,

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No. 89-1632

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

CLOSING BRIEF FOR PETITIONER

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CLOSING BRIEF FOR PETITIONER

ARGUMENT

I.

RESPONDENT WAS NOT SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT.

Respondent and his *amici* assert that he was seized under the Fourth Amendment when he saw Officer Pertoso running toward him on Foothill Boulevard in Oakland on the evening of April 18, 1988. They contend that this Court's cases do not require physical control of the citizen as a necessary element of a personal seizure;

indeed, they insist that this Court decisively rejected that requirement in *Michigan* v. *Chesternut*, 486 U.S. 567 (1986). They suggest that the "brightline" requirement of physical control is not bright at all, but would add a confusing element to the test enunciated in *United States* v. *Mendenhall*, 446 U.S. 544 (1980). They contend that the "restraint upon liberty" required by *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968), as an element of a personal seizure need not completely immobilize the person; it is sufficient if the officer controls the direction or speed of his movement. Finally, respondent and *amici* urge that this Court must reject petitioner's view of the seizure clause of the Fourth Amendment because it would encourage police to chase citizens in the streets without requisite cause to detain them. Such conduct, if left unregulated by the Fourth Amendment, would impinge upon the privacy and personal security of every citizen while traveling on the public streets. Petitioner respond to these arguments in turn.

A. Elements of a Seizure.

Since this Court's decision in *Terry* v. *Ohio*, *supra*, a seizure has been composed of two distinct elements: (1) restraint upon the liberty of a person; and (2) official action -- either physical force or show of authority -- which effects that restraint. *Id.* at 19 n.16. Both elements must be present to implicate the provisions of the Fourth Amendment. A show of authority without a consequent restraint is not a seizure; likewise, a citizen's decision not to leave the presence of a police officer who has not asserted his authority is not a seizure.

Since their identification in *Terry*, these elements have required explication. The use of force is an easily ascertainable fact, but it was not clear what constituted a show of authority. This Court rejected a test which would have required an inquiry into the subjective intent and belief of the police and citizen, and instead provided an objective standard: "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. at 554 (Opinion of Stewart, J.); *accord*, *Michigan* v. *Chesternut*, 486 U.S. at 573; *INS* v. *Delgado*, 466 U.S. 210, 215 (1984); *Florida* v. *Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *id.* at 514 (dissenting opinion).

We do not seek to overturn or modify in any way the *Mendenhall* standard. We can think of no better test to identify a show of authority from the almost infinite range of contacts between citizens and police. As Justice Stewart wisely observed in *Mendenhall*, "characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." 446 U.S. at 554. The *Mendenhall* objective standard "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment" and "also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Michigan* v. *Chesternut*, 486 U.S. at 574.

But any test which places a vast array of combinations of circumstances into only two categories

(seizure, no seizure) will have its limitations. It is necessarily imprecise because it assesses the coercive effect of police conduct, taken as a whole, instead of focusing in isolation on discrete details of the police activity. *Michigan* v. *Chesternut*, 486 U.S. at 573. Further, although the test is characterized as "objective," this Court, and only this Court, can decide whether a reasonable person would have felt free to leave. This determination is based on the host of factors which a police officer must evaluate in a matter of seconds. "[W]hat constitutes a restraint on liberty . . . will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Id.* at 573. Thus, because an officer will not know whether a given set of facts will constitute a restraint until the Court so declares, it is inaccurate to conclude that the *Mendenhall* objective standard provides a reliable predictor for the officer in the street.[1]

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1. In this sense it is reminiscent of the redefinition of a search announced in *Katz* v. *United States*, 389 U.S. 347 (1967). In *Katz*, of course, this Court discarded the standard of "constitutionally protected area" in favor of a "reasonable expectation of privacy." Compare *id* at 353, with *id*. at 361 (Harlan, J., concurring). Although the *Katz* reformulation was arguably necessary to protect the right of privacy in this age of high technology, this Court must periodically identify which expectations of privacy are "reasonable." *E.g., Florida* v. *Riley*, 488 U.S. 445 (1989); *California* v. *Greenwood*, 486 U.S. 35 (1988); *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986); *California* v. *Cirado*, 476 U.S. 207 (1986). Perhaps for purposes of providing predictability as well as continuity, this Court has not abandoned the familiar points of reference provided by property concepts in determining whether official conduct is a search. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n. 12 (1978); *see Oliver* v. *United States*, 466 U.S. 170 (1984).

Application of the *Mendenhall* test to the facts of this case demonstrates the limited utility of that standard in certain contexts. Specifically, the question whether a reasonable person would have believed that he was not free to leave necessarily assumes that he has *not* left. That is, the factual predicate for application of the *Mendenhall* test is stationary acquiescence in the officer's show of authority. Seizure denotes "an intentional acquisition of physical control." *Brower* v. *County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628, 635 (1989). Where, as here, the citizen has attempted to run from the officer, the *Mendenhall* test can have no relevance. The citizen is not under the officer's physical control. We must look elsewhere for guidance to determine whether a seizure has occurred.

We therefore turn to the second element of a seizure, the restraint upon liberty. Both respondent and *amicus* National Association of Criminal Defense Lawyers (NACDL) argue that physical restraint is unnecessary to effect a seizure. "Yet, it is obvious that restraint on a citizen's liberty may occur, before he is actually brought to a halt." (Resp. Br. at 22.) "However, *Terry* does not say that the citizen himself must be physically restrained." (*Amicus* NACDL Br. at 19.) It appears that all parties agree that a seizure requires an official restraint upon

one's liberty, but disagree about nature and extent of that restraint.

To begin with, we reiterate that a seizure does not require the use of physical force. An officer can seize a citizen without placing his hands or mechanical devices upon him. If an officer commands a citizen to "halt, in the name of the law" (show of authority), and the citizen ceases to walk (restraint upon liberty), a seizure has occurred. The citizen remains physically able to walk away, but his stationary submission to a show of authority amounts to a detention under *Terry* and *Mendenhall*. The next issue is the extent of restraint which, together with a contemporaneous show of authority, constitutes a detention.

Just as *Mendenhall* defines a cognizable display of authority under the Fourth Amendment, *Brower* v. *County of Inyo, supra,* explicates the concept of restraint. Respondent (Brief at 23), *amicus* NACDL (Brief at 16), the state court of appeal (J.A. at 135), and Professor LaFave (3 LaFave, Search and Seizure § 9.2(h), pp. 39-40 [2d.Ed. 1987, Supp. 1990]) all dispute the relevance of *Brower*, dismissing it as "a civil rights case." That is true, but it construed the Fourth Amendment, the identical article of governance which the Court must apply in this case. This Court has declared many times that 42 U.S.C. § 1983 is not a source of substantive rights but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). This Court has relied upon its criminal Fourth Amendment cases in defining a citizen's right to damages under § 1983. *See, e.g., Graham* v. *Connor*, ___ U.S. ___, 104 L.Ed.2d 443 (1989); *Malley* v. *Briggs*, 475 U.S. 335

(1986). Respondent has suggested no reason why cases decided under § 1983 should not inform the reach of the Fourth Amendment in a criminal context.

Brower defined a seizure as "a governmental termination of freedom of movement *through means intentionally applied.*" 103 L.Ed.2d at 635 (emphasis in original). Assuming without conceding the relevance of *Brower*, respondent argues that the foregoing definition is satisfied when a citizen is not free to move wherever he wants. Thus, if the police block a path, he is seized despite the availability of other avenues of travel. We contend that a seizure under *Brower* occurs when a person is unable to move at all, or when he moves at the specific direction of the police.[2] Both law and logic support our view.

Another passage in *Brower* characterized a seizure as the "intentional acquisition of physical control." 103 L.Ed.2d at 635. A person who can avoid police interference with his movement by choosing another path is not under their control despite their blockage of an avenue which otherwise would have been available to him. A simple example will serve to illustrate the validity of this principle. Assume that Main Street between Second and Third Avenues has been closed to traffic by firefighters who are combating a blaze on Main. A person who is walking up Main Street from First to Second Avenue cannot continue his direct route to Third

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2. For example, if an officer tells a person to "come here, in the name of the law," and the person complies, he is seized, because he has taken a path which the officer has chosen.

Avenue. He must turn left or right on Second Avenue, or turn and retrace his steps to First Avenue. As we understand the position of respondent and his *amici*, the pedestrian has been "seized" because his movement has been "influenced" by the fire fighting personnel. He may not go where he wishes as a result of a show of authority by the officials who have blocked Main Street between Second and Third Avenues. Our response is that the pedestrian has not been seized because he may take routes over which there is no governmental control. The availability of other avenues of movement, and the selection by the citizen of one of them, betoken the absence of control which is the hallmark of a seizure under the Fourth Amendment.[3/]

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3. The mere fact that governmental action has reduced the options for movement does not by that token mean that the choices still available are governmentally dictated. Citing *United States* v. *Place*, 462 U.S. 696 (1983), *amicus* NACDL argues that interference with a person's itinerary is a seizure. (*Amicus* Br. at 19-20 n.5.) *Place* correctly observed that a seizure of luggage is tantamount to a seizure of the traveler because he would be unwilling to leave without his belongings. 462 U.S. at 708. Placed in the *Mendenhall-Brower* analytical framework, the seizure of the luggage is a show of authority; the decision to remain at the airport awaiting its release is a submission to authority and thus an acquisition by police of physical control over the traveler -- a seizure. But the traveler had the option of leaving the airport; *if he took that option*, there would have been no seizure -- because no stationary acquiescence to a show of authority.

Finally, respondent argues that this argument was foreclosed by *Michigan* v. *Chesternut*, *supra*, which seemingly rejected the State of Michigan's argument that "the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority. Thus, the [State of Michigan] would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." 486 U.S. at 572. Respondent is incorrect in two respects.

First, this Court left "to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." *Id.* at 575-576 n.9. Instead, the Court merely held that the officer had not exhibited a display of authority which would have led a reasonable person to believe that he or she was not free to leave. Second, we have not argued that a chase *never* implicates the provisions of the Fourth Amendment until the citizen is apprehended. Rather, we have urged that *he* is not seized until he is restrained or halts in submission to a display of authority. If he discards incriminating evidence in reasonable anticipation that he will be searched, then his conduct is constitutionally attributable to the police officer, who has effected a seizure of the *object*. That is the teaching of *Brower*.

Respondent and *amici* err in arguing that we are urging this Court to discard settled precedent in favor of radical and unworkable new principles. *Terry*, decided over 20 years ago, set forth the two requirements of restraint and governmental act as elements of a seizure.

Mendenhall defined the parameters of a show of authority; *Brower* explicated (but did not create) the requirement of a physical restraint. In fact, it is respondent who advocates the overruling of settled doctrine in his contention that a person who is not within the control of police officers is somehow "seized."

B. Petitioner's Test Provides a Bright Line and Is Faithful to the Fourth Amendment.

Respondent and his *amici* insist that we have proposed an unworkable rule which will engender extensive litigation. In fact, it is respondent who is relying upon an untenable concept of a seizure. In respondent's view, if an officer says to a pedestrian, "Stop, in the name of the law," that person is seized regardless of his consequent response. Thus, if he runs from the officer, he is still seized, presumably because the officer has influenced the direction of his movement (away from the officer). It is not at all clear, however, at what point he is no longer seized. When he and the officer no longer see each other? When he reaches home or some other place of apparent safety? When he no longer reasonably feared police capture? If he tried to avoid the area which the officer patrolled but was free to go elsewhere, would he be seized because the officer "influenced" the direction of his travel? If he saw his likeness on a poster in a post office, would he be seized? Respondent's position would lead to patently absurd results.

Respondent argues that under our view of *Terry*, "[t]here would still be endless litigation over whether a suspect has come to a complete step or otherwise manifested his acquiescence in the seizure. Further, such

a rule certainly will not serve the purposes of the Fourth Amendment since it will shift the inquiry from the behavior of the police -- the core concern of the Amendment -- to the subjective reasons of a particular suspect." (Resp. Br. at 25-26; *see also amicus* NACDL Br. at 11.) Respondent is wrong on several counts.

First, we do not believe that the issue of physical restraint will require "endless litigation." Police control over a person is an easily ascertainable objective circumstance. If a person has submitted to an official show of authority, he is seized. It is as simple as that. Nor does the present rule require an exploration of the subjective thought processes of the citizen. His behavior consistent with the display of authority establishes a seizure under the Fourth Amendment. Both the action of the police and the reaction of the citizen are measured against an objective standard. The officer's conduct which would indicate to a reasonable person that he or she is not free to leave objectively indicates the officer's intent to seize. The citizen's reaction in submission to the display of authority objectively indicates his acquiescence to the display and thus consummates the seizure. We simply do not perceive in this simple two-step inquiry the difficulties envisioned by respondent and his *amici*. It certainly does not yield the absurd results which respondent's open-ended rule would produce.[4/]

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4. Even under respondent's view of the Fourth Amendment, he was not seized because, as we explained in our Opening Brief, a police officer running down the street does not "seize" everyone who happens to be in his path. (Pet. Br. at 25-31.) Respondent asserts that he

C. **Respondent's Rule Would Not Significantly Deter Police Misconduct.**

The heart of the dispute between the parties is whether police pursuit of citizens sufficiently threatens a common sense of security that it must be denominated a seizure in order to permit judicial control of that practice. In other words, are the exclusionary rule considerations present in this form of police-citizen encounter so grave that they must inform the scope of the right of privacy? Although it is difficult to dispute the occasional influence of this proposition in the resolution of Fourth Amendment claims (*see* 1 LaFave, *supra*, § 2.1(d), at pp. 313-314; A. Amsterdam, Perspectives on the Fourth Amendment, 58

"apparently knew the police were after him. It is reasonable to assume that, when Hodari saw the officer running toward him, he understood that the officer was connected to the brown Dodge he had seen moments earlier." (Resp. Br. at 15-16.) Even if it is assumed that respondent knew that the passengers in the unmarked car were officers (Resp. Br. at 15 n.4) -- a finding not made by the state courts -- respondent's argument requires an additional finding that he knew that the officers in the car "were after him." But the state court of appeal *expressly* found that he had no such knowledge (J.A. 133), a finding which finds fair support in the record. *Cf.* 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. 539, 546 (1981) (appellate court may make findings of fact). The state court's determination of the presence of an official display of authority was based solely upon the proposition that *any* police officer who runs toward *any* citizen has effected a seizure. It is that proposition which we contend finds no support in this Court's decisions.

Minn.L.Rev. 349, 403 [1974]), it is circumscribed by the overriding concern of the efficacy of the exclusionary rule in any given case. Speaking for the Court in *Terry* v. *Ohio*, Chief Justice Warren observed:

> "Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime. Doubtless some police 'field interrogation' conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." 392 U.S. at 13-14 (fns. omitted).

Both respondent and *amicus* NACDL argue that the requirement of physical control would exempt from judicial control "all instances of egregious or harassing police conduct lacking in actual physical restraint. . . ." (*Amicus* NACDL Br. at 15; *see also* Resp. Br. at 29.) Therefore, the argument runs, police can be deterred from engaging in street chases only by declaring them to

be seizures and suppressing their fruits. This argument suffers from several fatal flaws.

First, respondent and his *amici* all assume that all chases based upon less than reasonable suspicion have an illegal purpose and therefore all should be forbidden. That proposition is itself based upon an assumption that the officer is chasing, not merely following, the citizen. Respondent offers no criteria to determine when permissible "surveillance" (*see United States* v. *Knotts*, 460 U.S. 276, 281-285 [1983]) becomes a "chase."

Second, even if this formidable obstacle of predictable categorization could be overcome, we dispute the assumption that all chases have an illegal purpose. In fact, the officer may wish only to look at the citizen's face (*cf. United States* v. *Dionisio*, 410 U.S. 1, 14 [1973]), ask him about a crime which he may have witnessed but not perpetrated, or request directions to an unfamiliar destination. Not all police-citizen encounters involve the investigation of a crime committed by the citizen whom the officer is following or the "acquisition of evidence relating to the violation of a criminal statute." *Cady* v. *Dombrowski*, 413 U.S. 433, 441 (1973). Respondent ignores the very different reasons which police may have to pursue a citizen, insisting that all should be forbidden regardless of motive. Such an indiscriminately broad rule would unduly hamper both the investigating and caretaking functions of the police without providing a corresponding amount of protection to the privacy and security of the citizenry.

Finally, the most basic flaw in respondent's argument lies in his assumption that most if not all chases end in searches. Therefore, he concludes, the officers who

chased him must have had the same intent, and it is necessary to deter them and their brethren by suppression of the desired fruits of their misconduct. Respondent's assumption does not accurately reflect the reality of this case in particular or of the real urban world in general. Police do not frisk everyone they detain (3 LaFave, *supra*, § 9.4, p. 505 n.26), and no evidence appears in this record that Officer Pertoso intended to search respondent and manifested this intent to him. In the absence of empirical data to support his position, respondent is urging a conclusive presumption of intent. Such a presumption would not foster the purposes of the exclusionary rule for the following reason.

As stated above, it is simply not true that each detention results in a search and recovery of incriminating evidence. *Id.* An officer who is pursuing a person on the street with no thought of searching him will not be deterred by the possibility that evidence discarded by the citizen will be suppressed. We do not argue that the police officer will disregard the commands of the Fourth Amendment but that he will believe that the exclusionary rule is inapplicable to his activity. As *Terry* suggests, an officer not interested in searching for evidence is unlikely to be influenced by the suppression of accidentally discovered evidence. Only an officer who pursues with the intent to search would be deterred by suppression of evidence seized in similar circumstances.

Therefore, evidence should be suppressed only if it is discarded by a citizen who reasonably believes that the pursuing officer, acting without reasonable suspicion, intends to search him. Such a rule would discourage police officers from chasing citizens with the intent to

seize and search them without cause. It would not deter a police officer from chasing for the purpose of harassment, but respondent's rule would have no significant deterrent effect either, if the officer does not care about the evidence. The rule also would not reach the officer who secretly intends to search but does not communicate that intent. *See Michigan* v. *Chesternut*, 486 U.S. at 575 n.7. The citizen is not without redress, however, for he has the remedy of suppression if the officer actually seizes and searches him. But, for reasons explained in Argument II, his anticipation of a search is unreasonable in the absence of a manifested intent and therefore cannot be fruit of the poisonous tree. Therefore, the present remedy of suppression of evidence which is seized after a personal search is both appropriate and adequate.

ARGUMENT

II.

THE ABANDONMENT OF THE COCAINE WAS NOT THE FRUIT OF THE POISONOUS TREE.

We have argued that even if respondent had been detained unlawfully, his abandonment of the rock of cocaine was not the fruit of the poisonous tree because Officer Pertoso had not manifested an intent to commit the additional intrusion of searching him. This Court's cases teach that an intent to gather evidence is an indispensable element which connects, for constitutional purposes, a prior illegality with the subsequent discovery of evidence -- either tangible fruits, statements, or the testimony of a witness. Respondent disputes this analysis (Resp. Br. at 32), arguing that if the officers "expect[ed]" respondent to discard his contraband, it was fruit of the poisonous tree. (*Id.* at 39.) Neither the cases which he cites nor the record supports his position.

Brown v. *Illinois*, 422 U.S. 589 (1975), identified several factors which determined whether a confession was obtained by the exploitation of an illegal arrest. They included temporal proximity between arrest and confession, the presence of intervening circumstances, and, particularly, the purpose of the official misconduct. *Id.* at 605. Both parties agree that *Brown* articulates the relevant criteria, but dispute their application to the facts of this case. The record clearly establishes that the officers did not at any time communicate to respondent an

intent to search him. Absent proof of such intent, which a criminal defendant must adduce to establish the exploitative nexus between the prior illegality and the challenged evidence (*Alderman* v. *United States*, 394 U.S. 165, 183 [1969]), as a matter of law that evidence is not the fruit of the poisonous tree. The prosecution is not required to show the presence of some independent intervening cause which breaks the nexus because that connection was not shown to exist in the first place.

Respondent places great reliance upon the *Brown* line of authority (*Brown* v. *Illinois*, 422 U.S. 590; *Lanier* v. *South Carolina*, 474 U.S. 25 [1985]; *Taylor* v. *Alabama*, 457 U.S. 687 [1982]; *Dunaway* v. *New York*, 442 U.S. 189 [1979]), but these cases, while correctly decided, are inapplicable. All involved questioning -- an attempt to gather evidence -- while the suspect was illegally arrested. Indeed, the officers arrested the defendant in *Brown* for that express purpose. 422 U.S. at 605. To deter such illegal evidence-gathering techniques, the Court declined to hold that advisement of warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was sufficient to attenuate the taint of an unconstitutional arrest. Otherwise, "[a]ny incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all'. . . ." 422 U.S. at 602.

To illustrate the inapplicability of the salutary principle announced in *Brown*, we alter the facts to assume that the officers arrested the defendant without any intent to question him. If the arrestee spontaneously uttered an incriminating admission on the way to the station house, *Brown* would not preclude its admission at trial. By parity of reasoning, evidence discarded by a

detainee to whom the officers did not communicate an intent to search should also be admissible.

The resolution of this issue is plainly controlled by *Brower* v. *County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628 (1989); and *Hester* v. *United States*, 265 U.S. 57 (1924). In *Hester*, the defendant dropped a bottle of illegally distilled liquor while being chased by revenue officers, who thereupon recovered the bottle. In holding that the recovery was not a seizure under the Fourth Amendment, this Court relied upon two principles, both necessary to the disposition of the case. First, the defendant's abandonment was not a seizure because "[t]he defendants own acts, and those of his associates disclosed the [incriminating evidence.]" *Id.* at 58. This view was recently confirmed in *Brower* v. *County of Inyo, supra*, which observed that "even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action by the police, the court had held that no seizure had taken place." 103 L.Ed.2d at 636. Second, the officers' recovery of the bottles on the property of the defendant's father was not a seizure because it occurred in an "open field." 265 U.S. at 59. This principle was later confirmed in *Oliver* v. *United States*, 466 U.S. 170 (1984).

The first principle, of course, is directly relevant to this case. It supports our position that an object discarded by a citizen who fears capture is not seized unless the officer has communicated an intent to take that object. The fact that the officer intends to detain the person does not alone suffice to indicate an intent to search. Even assuming that the officer communicated to respondent an intent to detain him, he did not additionally

indicate an intent to conduct a search sufficiently intensive to uncover the rock of cocaine.

Respondent disputes the relevance of *Hester*, arguing that the seizure issue would have been decided differently under fruit of the poisonous tree analysis. That doctrine's roots can be traced not to *Wong Sun* v. *United States*, 371 U.S. 471 (1963), as respondent claims (Resp. Br. at 47), but to *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), a case decided four years before *Hester* and written by the same author: Justice Holmes. Thus, there is no merit to respondent's claim that the Court in *Hester* was ignorant of the "fruits" doctrine when it ruled that the defendant's acts were the cause of the recovery of the evidence.

More fundamentally, respondent's abandonment of the cocaine was not fruit of the poisonous tree for precisely the same reason that it was not a seizure in the first place: the officers did not manifest an intent to search him. Respondent is reduced to arguing that "it is quite foreseeable that a defendant faced with an illegal detention will try to discard contraband" (Resp. Br. at 37); and the officers "hoped their actions would provoke Hodari into a panic thereby inculpating himself. . . ." (Resp. Br. at 39.) It is unnecessary to quarrel about the question of forseeability, which connotes notions of negligence liability, because a seizure requires something more: an intent to gain control of the object in question. Nor are the "hopes" of the officers at all relevant, because uncommunicated intent plays no part in Fourth Amendment seizure analysis.

The decision in *Hester* is consistent with the Court's later evaluation of the "fruits" doctrine. The Court has

made clear that there is no"per se" or "but for" rule excluding evidence that comes to light through a causal chain beginning with an illegal seizure. *New York* v. *Harris*, 110 S.Ct. 1640, 1642 (1990); *United States* v. *Ceccolini*, 435 U.S. 268, 276 (1978). Yet that is precisely what respondent asks the Court to conclude in this case. Respondent's decision to discard the crack cocaine was not materially different from Hester's decision to drop the jug of "moonshine." Each act was an "independent act of free will" in the sense meant by *Wong Sun* because each was not the action ordered by the police, and each was not the only and necessary response to the officers' command. The officers did not expressly or implicitly order respondent to empty his pockets; at most, Officer Pertoso simply "ordered" respondent to stop. It was respondent who decided that, if he was going to be stopped, he did not want to have the cocaine on him. Perhaps respondent believed (mistakenly, it turned out) that he could throw away the cocaine without being seen; perhaps respondent believed (again mistakenly) that he could not be charged with drug possession if the drugs were not on his person. But in either case it was respondent's mistaken belief, and not Officer Pertoso's pursuit of respondent, that led him to jettison the cocaine. Respondent's misapprehension about the consequences of discarding the cocaine does not vitiate the voluntariness of his actions. *Cf. Connecticut* v. *Barrett*, 479 U.S. 523, 530 (1987).

CONCLUSION

The judgment of the California Court of Appeal for the First District should be reversed.

DATED: January 4, 1991

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No. 89-1632

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In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF CALIFORNIA, PETITIONER

v.

HODARI D.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a police officer's pursuit of an individual who flees at the sight of the officer constitutes a "seizure" under the Fourth Amendment before that individual's flight has been halted.

2. Whether drugs that a suspect abandons during his flight from a police officer are subject to suppression as the fruits of an unlawful seizure.

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ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents two questions regarding the role of the Fourth Amendment when police pursue an individual who flees as the police approach. The resolution of those questions is likely to affect federal prosecutions under the drug and firearms laws, as well as cases arising in the District of Columbia and on federal reservations, where federal agencies have general law enforcement responsibilities.

STATEMENT

1. On April 18, 1988, at about 10 p.m., Officers Brian McColgin and Jerry Pertoso of the Oakland Police Department's Drug Task Force were on patrol in their un-

marked car in a high crime area of Oakland. Both officers wore blue jackets with the word "Police" on the front and back. Tr. 1-2. As the officers turned onto one of the streets in the area, they saw four or five young men huddled around a small red car parked at the curb. Two of the youths looked at the officers' car and immediately began running away. The red car then drove off quickly, and the other youths ran off as well. Tr. 3-4, 12-13. Suspecting that illegal drug activity was afoot, the officers decided to pursue the youths to "find out who they were and what their purpose was for being there in the area." Tr. 4, 13-14, 17.

Officer Pertoso left the car and circled around to the back of the block where several of the youths had run. Tr. 4, 13-14. Officer McColgin drove around the block in the opposite direction. Tr. 4. As Officer Pertoso approached from the rear, he saw respondent running toward him while looking back over his shoulder as he ran. Tr. 14. When Officer Pertoso and respondent were about 11 feet apart, respondent turned forward, saw the officer, and looked startled. Before Officer Pertoso could say or do anything, respondent made a backward scooping motion with his hand and threw "a single loose rock" onto the sidewalk. Tr. 15, 18. Suspecting that the rock was "crack" cocaine, Officer Pertoso apprehended respondent, who had continued running toward him. *Ibid.* Officer Pertoso forced respondent to the grass, handcuffed him, and radioed Officer McColgin. Tr. 5, 15. McColgin arrived and retraced respondent's route back to where the officers had first seen the youths. Along the way, he found a plastic baggie containing 15 chunks of cocaine. Tr. 5-6, 73-77. The rock discarded by respondent also proved to be cocaine. *Ibid.* A search of respondent uncovered $130 in cash and a pager. Tr. 71-72.

2. A juvenile proceeding was brought against respondent, charging that he had possessed cocaine and violated a curfew. Respondent moved to suppress the cocaine. After an evidentiary hearing, the court denied the motion. Tr. 62. The court did not issue an opinion or give a formal statement of its reasons. The court's comments indicated, however, that it believed respondent had been unlawfully seized, but had voluntarily discarded the cocaine. Tr. 28-61; Pet. App. 4-5. The court then sustained the charges in the petition and committed respondent to a county facility for five years and eight months. Tr. 82-83.

3. The California Court of Appeal reversed the judgment of wardship, ruling that the cocaine the officers had seized on the ground along respondent's path should have been suppressed as the product of an illegal seizure. Pet. App. 1-19. The court held that respondent was "seized" when he saw Officer Pertoso "running directly at him," because "it is coercive and intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk." Pet. App. 8-9. Police pursuit amounts to a "seizure," the court explained, when the officers give chase "in a manner designed to overtake and detain or encourage the individual to give up his flight," even if that person is still fleeing from the officers. Pet. App. 9.[1]

The court also ruled that respondent's decision to abandon the cocaine was the direct product of the officer's illegal seizure of respondent, and was not an independent act of respondent's free will. Pet. App. 15-19. The court therefore ordered the suppression of all the cocaine, including the rock that respondent threw down shortly after he saw

[1] Even if a physical restraint were necessary, the court ruled, Officer Pertoso's actions were "tantamount to a physical seizure," because the officer's conduct "sufficiently blocked" respondent's "physical freedom of movement." Pet. App. 12 n.4.

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Officer Pertoso and the bag of cocaine that was later found along the route respondent had followed as he ran away from the vicinity of the red car. Pet. App. 19.[2]

4. The California Supreme Court denied the State's application for review. Pet. App. 21.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Respondent was not arrested until Officer Pertoso saw him discard what the officer believed to be a form of cocaine base known as "crack." At that point, Officer Pertoso had probable cause to arrest respondent for illegal possession of drugs. Accordingly, unless the officers' prior actions violated the Fourth Amendment, that piece of crack, as well as the plastic baggie of crack that the officers later discovered along the path of respondent's flight, was admissible as evidence.

The California Court of Appeal held that Officer Pertoso's pursuit of respondent became a "seizure" within the meaning of the Fourth Amendment when respondent saw Officer Pertoso "running directly at him." Pet. App. 8. The court so held even though at that time respondent was still attempting to make good his escape.

That conclusion, we submit, gives an unduly broad reading to the term "seizure." In our view, a "seizure"

[2] In addition, the court held that the officers lacked reasonable suspicion to justify temporarily detaining respondent. Pet. App. 12-15. The court held that respondent's flight alone was insufficient to constitute reasonable suspicion, Pet. App. 13-14, and that the location of the event in an area known for drug activity was also insufficient to justify a temporary detention. The State has not raised the reasonable suspicion argument in its petition, and for that reason we have not discussed it here. We believe, however, that the court's analysis of that issue was incorrect, for the reasons we have discussed in our briefs in *Michigan* v. *Shabaz*, 478 U.S. 1017 (1986) (No. 85-1265), and *Michigan* v. *Chesternut*, 486 U.S. 567 (1988) (No. 86-1824).

occurs when (1) the police have physical control over an individual, or (2) the police in some manner direct the individual to stop and he complies with the command. In the latter case, the seizure occurs at the time that the suspect accedes to the police command, since it is from that time that the suspect is effectively under police control.

The distinction between the test we propose and the test applied by the California Court of Appeal is a subtle one that is not likely to make a difference in the analysis or the outcome of most cases. There is one class of cases, however, in which the distinction *will* make a difference: where the suspect ignores the command to stop, and the police obtain legal grounds for stopping the individual after he flees but before he is apprehended.

If, as the Court of Appeal held, the seizure occurs at the time the officers first unsuccessfully order the individual to stop, the evidence ultimately obtained will be subject to suppression if the court finds that the officers did not have a legal justification for the stop at the time of the initial order. That will be true even if the events that occur between the time of the officers' command to stop and the eventual apprehension of the individual give the officers ample justification for the seizure. On the other hand, if the seizure occurs only when the officers obtain physical control over the individual or the individual complies with their order to stop, evidence obtained as a result of the seizure will be admissible as long as the officers have a sufficient legal basis for the seizure at the time they gain control over the individual, either by force or acquiescence.

The common understanding of the term "seizure," both today and at the time the Fourth Amendment was adopted, strongly supports the view that an individual is "seized" only when the police succeed in obtaining actual or constructive control over his movements. No seizure occurs when the police fail in their efforts to restrain him.

There may have been an "attempted seizure" in such cases, but it could hardly be said of a policeman who returns empty-handed to the station after a chase that he "seized" the fleeing suspect.

Under the test we propose, it is clear that Officer Pertoso did not "seize" respondent until the officer obtained physical control over him. Even if Officer Pertoso's actions could be regarded as clearly indicative of his determination to detain respondent, respondent did not acquiesce in that effort, but kept running until he was physically restrained, at which time he had thrown down the rock of crack and thereby given Officer Pertoso probable cause to arrest him. The seizure of respondent was therefore lawful, since Officer Pertoso's conduct did not at any point violate the Fourth Amendment's proscription against unreasonable seizures.

2. Even if the Court of Appeal was correct in holding that Officer Pertoso's pursuit of respondent resulted in a seizure prior to the time respondent threw away the cocaine he was carrying, and even if the court was correct in holding that the seizure of respondent was not supported by reasonable suspicion at the time the seizure is deemed to have occurred, the court was still wrong in suppressing the cocaine. Evidence seized following an unlawful search or seizure is subject to suppression only if it is obtained through exploitation of the illegal police conduct; if the evidence is obtained through means sufficiently independent of the illegal conduct to be freed of the taint of that conduct, suppression is not appropriate.

In this case, the baggie of cocaine found along respondent's path is clearly not the product of the seizure that the court determined to have occurred in this case when Officer Pertoso suddenly appeared only a few feet in front of respondent. Respondent's decision to abandon the cocaine may have been the product of concern that the police

would find him in possession of cocaine, but it could not have been the product of any unlawful police action that had occurred at that time.

Similarly, respondent's decision to throw down the rock of cocaine that was found nearby following his arrest constituted an independent act of free will on respondent's part. It may have been precipitated by the sudden appearance of Officer Pertoso, but it was not the fruit of any unlawful action on Pertoso's part, as would have been the case, for example, if Officer Pertoso had found the cocaine during an unlawful search of respondent's person after seizing him.

ARGUMENT

I. RESPONDENT HAD NOT BEEN "SEIZED" FOR PURPOSES OF THE FOURTH AMENDMENT WHEN HE DISCARDED THE COCAINE

A. Police Pursuit Of An Individual In Flight Does Not Constitute A Seizure Unless The Police Intentionally And Successfully Impede The Individual's Freedom Of Movement

1. The California Court of Appeal correctly ruled that police pursuit of a suspect, without more, is not a "seizure." This Court expressly so held in *Michigan* v. *Chesternut*, 486 U.S. 567 (1988). In that case, the defendant saw a police patrol car driving along the street in his direction and, without any provocation from the officers, ran away from it. The officers followed the defendant in their car and watched him discard packets of drugs as he ran. At his trial for drug possession, the defendant claimed that the drugs should be suppressed because he had been "seized" once the officers decided to pursue him. The Court rejected that argument. 486 U.S. at 574. The Court acknowledged that a police officer's presence and pursuit "could be somewhat intimidating," but nonetheless

held that the officers' conduct in that case did not constitute a "seizure," since the officers did not take any of the coercive steps that police ordinarily use to apprehend a suspect: The officers did not activate their car's siren or flashers; they did not command the suspect to halt; they did not display a weapon; and they did not operate their car in an aggressive manner in order to block the suspect's course or control the speed or direction of his movement. *Id.* at 575. The officers' conduct, the Court found, was not "so intimidating" that a person "could reasonably have believed that he was not free to disregard the police presence and go about his business." *Id.* at 576 (quoting *INS* v. *Delgado,* 466 U.S. 210, 216 (1984)).

The California Court of Appeal read *Chesternut* to hold that a person in flight can be "seized" if the police engage in intimidating conduct indicating their intention to detain him, regardless of the suspect's response. The court noted that *Chesternut* declined to adopt the "bright-line rule" endorsed by the State in that case, under which police conduct would not constitute a "seizure," regardless of the nature or degree of coercion involved, "as long as the police did not succeed in actually apprehending the individual." 486 U.S. at 572. Relying on that passage in *Chesternut,* the Court of Appeal concluded that a person is "seized" at the moment the police communicate to him their intent to restrain his movement, even if the person ignores the police efforts to stop him or endeavors to elude the officers.

Although it is true that the Court in *Chesternut* declined to adopt the "bright-line" test proposed by the State in that case, the Court did not reject the State's test as a matter of law. Rather, the Court found it possible to decide the *Chesternut* case without the need to adopt or reject the test proposed by the State; as the Court explained, it "determine[d] only that, in this particular case, the police conduct in question did not amount to a seizure." 486 U.S.

at 573. The Court pointedly left "to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." *Id.* at 575-576 n.9.

Chesternut therefore does not foreclose the conclusion that a person still in flight has not been "seized," regardless of police efforts to stop him. Rather, *Chesternut* simply stands for the proposition that coercive or intimidating conduct, which was absent in that case, is a *necessary* condition for a "seizure." It does not stand for the much broader proposition that such coercive or intimidating conduct is a *sufficient* condition for a "seizure."

Our understanding of *Chesternut* is consistent with that of the concurring Justices in that case, who interpreted the opinion as leaving open the question whether a seizure can occur without physical control by the police or acquiescence by the suspect. See 486 U.S. at 576-577 (Kennedy, J., concurring). That understanding of *Chesternut* is also consistent with the Court's decision the following Term in *Brower* v. *County of Inyo,* 109 S. Ct. 1378 (1989), which clearly indicated that a person who is still in flight has not been seized.

In *Brower,* a person attempting to escape from the police in a stolen car crashed into a roadblock that was designed to bring him to a halt. The Court held that under those circumstances, the driver had been "seized" by the officers. In so ruling, the Court emphasized that a Fourth Amendment "seizure" requires the acquisition of control, *i.e.,* an actual restraint on the suspect's freedom of movement. The Court said that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control," 109 S. Ct. at 1381, and that "a Fourth Amendment seizure [occurs] * * * only when there is a governmental termination of freedom of movement through means intentionally applied," *ibid.* (emphasis omitted). *Brower* thus supports the conclusion that a person in flight, like respondent, has not been "seized" unless and until his escape attempt is foiled.

2. Historical evidence from the Nation's formative period provides further support for this view. The historical evidence reveals that the term "seizure" has traditionally been understood to require actual control over the person or thing seized and could not reasonably be said to include someone, like respondent, who was in flight. Eighteenth and nineteenth century dictionaries, for example, defined the term as requiring actual control over the person or thing seized.[3] Moreover, it was well understood that the term "arrest," which was used interchangeably with the term "seizure" in several colonial constitutions,[4] required the obtaining of control over the arrested party.[5]

[3] Samuel Johnson's renowned 2 *Dictionary of the English Language* (1755) (facsimile ed. 1968) defined "seize" as "To take possession of; to grasp; to lay hold on; to fasten on," and defined "seizure" as "The act of taking forcible possession. • • • Catch." Noah Webster's 1828 dictionary defined the term "seize" as "1. To fall or rush upon suddenly and lay hold on; or to gripe or grasp suddenly. 2. To take possession by force • • • 3. To take possession by virtue of a warrant or legal authority." 2 *American Dictionary of the English Language* 67 (1st ed. 1828) (facsimile ed. 1985). The example given is "The hawk seizes a chicken with his claws. The officer seizes a thief." *Ibid.* The dictionary that later became the Oxford English Dictionary defined the word "arrest" as To stop and lay hold of. • • • To catch, capture, seize, lay hold upon. • • • To capture, seize, lay hold upon, or apprehend by legal authority • • •." 1 *Murray's New English Dictionary* 460 (1888). That dictionary also defined the word "seize" as "To take possession of (goods) in pursuance of a judicial order; To take possession of by force; to capture; To take prisoner, to catch; To take hold of with the hands, claws, teeth, etc." 8 *Murray's New English Dictionary* 403 (1914).

[4] See Mass. Decl. of Rights of 1780, art. XIV; Md. Decl. of Rights of 1776, art. 23; Vt. Const. of 1777, ch. I, § 11; N.H. Bill of Rights of 1784, § 19.

[5] See *United States* v. *Benner*, 24 F. Cas. 1084, 1086 (C.C.E.D.Pa. 1830) (No. 14,568) ("An arrest is the taking, seizing or detaining the person of another, touching or putting hands upon him."); 1 *Murray's New English Dictionary* 460-461 (defining "arrest" as "[t]he act of standing still, halting, or stopping; stoppage, stop, halt, delay. • • • The act of stopping anything in its course. • • • The apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime."); 1 N. Webster, *supra*, at 13 (defining "arrest" as "To obstruct; to stop; to check or hinder motion. To take, seize or apprehend by virtue of a warrant."). As a matter of original understanding, one could not be arrested – or seized – until he was in the physical custody of the seizer and within his control.

Court decisions in other areas of the law manifest the same understanding. When discussing the "seizure" of tangible items, the courts uniformly interpreted that term to contemplate control over the item seized. As this Court wrote in *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906), "a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner." See also, *e.g.*, *Pelham* v. *Rose*, 76 U.S. (9 Wall.) 103, 106 (1870) ("by the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects capable of manual delivery, the term means caption; the physical taking into custody.").

Many early maritime cases turned on whether a ship had been seized, and the use of the term in that context is consistent with the test we propose under the Fourth Amendment. In *The Josefa Segunda*, 23 U.S. (10 Wheat.) 312 (1825), the Court considered the competing claims of persons who asserted that they had seized the ship and were entitled to the proceeds of the sale of the cargo.

> It is not sufficient [for a claim of seizure] that [the would-be seizer] intended to make one, or that, on some occasions, he expressed to third persons that he had so done. There must be an open, viable possession claimed, and authority exercised under a seizure. The parties must understand that they are dispossessed,

and they are no longer at liberty to exercise any dominion on board of the ship.

Id. at 325.

That explanation of "seizure" comports with the dictionary definitions. Indeed, most cases involving ship seizures use the term to mean physical taking over and control of the ship. See *The Caledonian,* 17 U.S. (4 Wheat.) 100 (1819); *The Saratoga,* 9 F. 322 (S.D.N.Y. 1881); *United States* v. *The Henry,* 26 F. Cas. 277 (C.C.S.D.N.Y. 1859) (No. 15,352) ("It may be that there was such an interference with the vessel by the officers * * * as would, though falling short of a technical seizure, subject them to an action by the claimant."); *Le Tigre,* 15 F. Cas. 404 (C.C.D.N.J. 1820) (No. 8281); *The Bolina,* 3 F. Cas. 811, 813 (C.C.D. Mass. 1812) (No. 1608) ("It has been also slightly contended, that upon the facts there was no seizure, but a mere possession and detention: but the possession was diligently followed up by an information of forfeiture: and it seems to me to have been as full and complete as any seizure could be"); *Barney* v. *Maryland Ins. Co.,* 5 H. & J. 139 (Md. 1820).[6] In sum, at common

[6] Early American courts typically used the term "seize" in the same sense in civil cases as well. For example, in cases of attachment of personal belongings to satisfy a debt or judgment, sheriffs were required to "seize" the property. In *Train* v. *Wellington,* 12 Mass. 494, 497 (1815), the Massachusetts Supreme Judicial Court said that "to constitute an attachment, there must be an actual seizing of the goods by the officer; not that every article must be taken hold of, but that he must be in view of the whole, with the power of taking them into his actual possession." Likewise, in a case involving the seizure of property to satisfy a lien, the Louisiana Supreme Court said that "[t]here must be * * * an act of taking possession of the property; the thing seized must be put in the hands of the officer; otherwise, the seizure is incomplete, or rather, there is no seizure." *Goubeau* v. *New Orleans & Nashville Ry.,* 6 Rob. 345, 347 (La. 1844). The court in *Goubeau* turned to the dictionary to ascertain the meaning of the word.

law the concept that someone could be in flight and yet also be "seized" would have been unfathomable.

3. The line of this Court's decisions beginning with *Terry* v. *Ohio,* 392 U.S. 1 (1968), is consistent with the rule we propose. In *Terry,* the Court noted that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." 392 U.S. at 19 n.16. An actual restraint on liberty is therefore required before a citizen will be regarded as "seized."

In *Terry*'s wake, this Court has decided a large number of cases in which the issue was whether, in the context of a citizen-police encounter, the citizen has been intimidated into forgoing his right to leave or instead has voluntarily elected to cooperate with the authorities. In that context, the Court has applied the so-called *Mendenhall* test, drawn from Justice Stewart's opinion in *United States* v. *Mendenhall,* 446 U.S. 544 (1980). That test provides that in assessing a police-citizen encounter in which the citizen is apparently cooperating with the police, the police can be said to have seized the citizen "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 554 (opinion of Stewart, J.); see also *Florida* v. *Royer,* 460 U.S. 491, 497, 501 (1983) (plurality opinion); *id.* at 514 (Blackmun, J., dissenting); *id.* at 523 n.3 (Rehnquist, J., dissenting); *INS* v. *Delgado,* 466 U.S. at 216-217, 219-221; *Florida* v. *Rodriguez,* 469 U.S. 1, 5-6 (1984).

The *Mendenhall* test is suitable for resolving the frequently recurring case in which the question is whether a person remained in an officer's presence because he was intimidated (and therefore was "seized") or because he was being cooperative (and therefore was not "seized").[7]

[7] The test takes into account the fact that many people will cooperate with a reasonable request by a police officer to answer some questions, or to supply some identification, whether out of a sense of civic

It is only when the officer's conduct becomes "so intimidating" that a reasonable person would conclude that he is not "free to leave" that a Fourth Amendment "seizure" occurs. *INS* v. *Delgado*, 466 U.S. at 216; *Chesternut*, 486 U.S. at 577 (Kennedy, J., concurring) ("A Fourth Amendment seizure occurs when an individual remains in the control of law enforcement officials because he reasonably believes, on the basis of their conduct toward him, that he is not free to go.").

The *Mendenhall* test, however, does not address the very different issue presented in a case such as this one, where the individual has fled for the very purpose of avoiding the police. In that setting the court is not faced with the question whether the individual has remained in the presence of the officers as a matter of compulsion or choice. Instead, the court is faced with the quite distinct question whether the individual is under police control at all. If he is not, then regardless of the police efforts to apprehend him, he has not been seized.

In *Chesternut*, the Court was able to apply the *Mendenhall* test because the police conduct, objectively viewed, did not manifest an intention to seize the suspect; it was therefore unnecessary for the Court to ask the quite distinct question whether the suspect was effectively under police control. But the fact that the Court applied the *Mendenhall* test in *Chesternut* does not mean that a suspect has been seized the moment the police communicate to him that they intend to take him into custody. An all-points-bulletin directing the arrest of a suspect who is at large does not constitute a "seizure" if the suspect happens to be listening on his police scanner. Rather, when an individual flees or refuses to respond to police commands to stop, he is not "seized" within the meaning of the Fourth Amendment until and unless the police succeed in bringing him under their control.

B. The Pursuit Of Respondent Did Not Constitute A Seizure

The Court of Appeal regarded as significant to its finding of a seizure that Officer Pertoso was running toward respondent when respondent saw him.[8] But that indicates nothing more than that the officer was pursuing respondent and that the chase was almost at an end. In every "pursuit" case in which the timing of the seizure is at issue, the officer will be running directly toward the suspect, although ordinarily the officer will be chasing him from behind.

The Court of Appeal did not suggest that respondent acquiesced in what he perceived to be Officer Pertoso's effort to apprehend him. Therefore, this case, which arises at the end of the chase, shortly before the officer obtained custody of the suspect, is not analytically different from a case arising at the beginning of the chase, when the officer first begins to pursue the suspect and the suspect first begins to flee. In this case, the record makes it clear that from the time the pursuit began until Officer Pertoso wrestled respondent to the ground, respondent was refusing to acquiesce in the officer's effort to apprehend him. Respondent was therefore not seized until the moment of his capture.

It is likely that respondent believed that it was not safe to remain standing near the red car because he was in possession of narcotics at the time. And respondent may well have anticipated that the officers were about to approach him. But regardless of his subjective impressions, respondent was free throughout—in the sense contemplated by *Terry*—to act as he chose: to remain on the street, to walk away, or even to run. 392 U.S. at 19 n.16.

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duty, an inclination to cooperate with the authorities, or the belief that a refusal to cooperate will focus suspicion on them.

[8] The court correctly disregarded the actions taken by the officers to encircle and head off respondent—what the court called a "police pincer maneuver"—because respondent was unaware of what the officers were doing. Pet. App. 8. Police conduct of which a suspect is unaware cannot render him "seized" under the Fourth Amendment. *Chesternut*, 486 U.S. at 575 n.7.

It is likely also true that respondent believed that he could not escape once he spotted Officer Pertoso in his escape path. As it turned out, he was correct. But the officer did not bring to a halt respondent's attempt to escape until after respondent had discarded the drugs, and that fact is critical. Until then, there was no "governmental termination of freedom of movement through means intentionally applied," *Brower*, 109 S. Ct. at 1381 (emphasis omitted), which is necessary before there can be a Fourth Amendment seizure.

II. THE COCAINE RESPONDENT DISCARDED DURING HIS FLIGHT FROM THE OFFICERS SHOULD BE ADMITTED EVEN IF RESPONDENT HAD PREVIOUSLY BEEN UNLAWFULLY SEIZED

Even if Officer Pertoso is deemed to have seized respondent when respondent saw him, and even if the seizure is regarded as unlawful, the drugs recovered by the officers should have been admitted nonetheless. Evidence is not the " 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). The police must exploit that illegality in some manner before evidence becomes so tainted, and an intervening act by the suspect himself can break the causal chain. See *id.* at 486; *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975). Respondent engaged in just such an intervening act in this case.

The Court of Appeal determined that the officers recovered the drugs "through exploitation of their illegal activity" and "as a direct result of that action," Pet. App. 18, but that conclusion is mistaken. To begin with, the court did not distinguish between the drugs respondent jettisoned *before* he saw Officer Pertoso, which Officer McColgin retrieved when he retraced respondent's escape route, from the drugs that respondent discarded *after* he

saw Officer Pertoso. That distinction is important since respondent plainly had not been "seized" when he abandoned the bag of crack along his escape route. That bag should not have been suppressed, because the officers did not obtain it as the result of an unlawful seizure of respondent. See *Nix* v. *Williams*, 467 U.S. 431, 444 (1984) ("cases implementing the Exclusionary Rule begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity."). Respondent freely abandoned that bag; it therefore was not the fruit of any subsequent unlawful seizure.

The "single loose rock" respondent threw away once he saw Officer Pertoso is also admissible, under the authority of this Court's decision in *Hester* v. *United States*, 265 U.S. 57 (1924). There, federal officers, suspecting Hester of bootlegging, watched from the open fields surrounding Hester's home as he handed a bottle of "moonshine whiskey" to someone else. When an alarm went out, Hester fled, but he and the other person dropped the bottle and a jug as they ran. Hester later moved to suppress the officers' testimony on the ground that their conduct violated the Fourth Amendment. This Court rejected his argument, reasoning that "[i]t is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search and seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned." *Id.* at 58.

Hester demonstrates that the Court of Appeal erred. In the passage quoted above, this Court assumed that the officers had committed an unlawful search by trespassing on Hester's property, but nonetheless concluded that it was Hester's and his associate's "own acts" that disclosed the

whiskey.[9] The same is true here. Just as the agents' presence convinced Hester that he should give up the moonshine business, Officer Pertoso's presence along respondent's escape route convinced him that it was unwise to possess cocaine. But here, as in *Hester*, the evidence was recovered because of respondent's "own act" of throwing it away before he ran into Officer Pertoso. Officer Pertoso did not exploit the seizure to obtain the drugs, because he did not obtain the drugs through a search of respondent. Rather, he found the rock of crack cocaine in plain view where respondent threw it. Accordingly, the rock of crack cocaine was admissible even if Officer Pertoso's actions in pursuing respondent were unlawful.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted.

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NOVEMBER 1990

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[9] Later in the opinion the Court held that there was no unlawful search, since the "open fields" are not part of the home. 265 U.S. at 59. But the Court made that point independently of the one discussed in the text.

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No. 89-1632

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,

PETITIONER,

v.

HODARI D.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA

BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE ON BEHALF OF PETITIONER

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QUESTION PRESENTED

Did the observations of the police officers provide sufficient reasonable suspicion for an investigatory detention?

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IN THE
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v.

HODARI D.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE ON BEHALF OF PETITIONER

Amicus curiae, the Appellate Committee of the California District Attorneys Association, and Ira Reiner, District Attorney of Los Angeles County, are filing this brief accompanied by the written consent of all parties pursuant to Rule 37.3, Rules of the Supreme Court of the United States.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California

and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter -- which raises the question of what constitutes reasonable suspicion for detention of individuals who flee at the approach of law enforcement personnel -- the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case shall likely have substantial impact upon the administration of criminal justice throughout California. *Amicus* also believes that the *amicus curiae* brief attached hereto "brings relevant matter to the attention of the court that has not already been brought to its attention by the parties" in that petitioner has chosen not to argue the issue of whether reasonable cause existed for the detention of respondent. Rule 37.1, Rules of the Supreme Court of the United States.

Amicus concurs with the position taken by the Attorney General of the State of California, as presented in the Petition for Writ of Certiorari, that there was no detention prior to the physical restraint of respondent by the police. However, *amicus* herein discusses an issue that the respondent has raised (see Respondent's Brief in Opposition to Petition for a Writ of Certiorari, pp. 8-23): whether, if there was a detention, it was based on reasonable suspicion. This issue is not addressed by petitioner, since petitioner takes the position that the conduct of the police was lawful whether or not there was reasonable suspicion for an investigatory detention.

SUMMARY OF ARGUMENT

The California Court of Appeal briefly discussed the issue of reasonable cause to detain respondent. That court noted that the Attorney General [respondent below] did not dispute the trial court's findings that the police had no reasonable cause to chase or detain respondent herein. The Court is not bound by the apparent concession of the Attorney General of the State of California below. *Sibron v. New York*, 392 U.S. 40, 58 (1968). Since respondent did raise the issue of reasonable cause in the courts below, *amicus*, out of an abundance of caution, addresses that issue here.

In *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988), this Court found it unnecessary to decide the issue of whether and under what circumstances flight from police officers may, without more, provide a sufficient reason for an investigatory stop. *Amicus* argues that the California State Court of Appeal failed to give the factor of unprovoked flight from the police officers proper weight in assessing whether that flight together with other facts articulated by the police concerning their observations, *i.e.*, four young men huddled together at the side of a car in the attitude of drug sellers at 10:00 p.m. at an address where trained narcotics officers had previously made arrests for narcotics sales.

Since *Peters v. New York*, decided concurrently with *Sibron v. New York*, 392 U.S. 40, 66-67, flight at the approach of strangers or law enforcement has been considered a strong indicia of suspicious conduct. Where some other indicia of criminal behavior is observed, unprovoked flight in the presence of strangers or police officers provides the particularity and specificity of an individual's suspicious conduct required for an investigatory detention. See *United States v. Cortez*, 449 U.S. 411, 417-418 (1981).

ARGUMENT

I

THIS COURT IS NOT BOUND BY THE APPARENT CONCESSION OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA ON THE ISSUE OF REASONABLE CAUSE TO DETAIN

In the opinion of the California State Court of Appeal the issue of reasonable cause to detain is discussed briefly. That court stated:

> The trial court concluded that the police had no reasonable cause to detain appellant prior to his discard of the drugs. Respondent does not dispute the trial court's finding that the police had no reasonable cause to chase or detain appellant, choosing to rest on the argument that there was no detention.

See Appendix A to the Petition for Writ of Certiorari previously filed.

This Court is not bound by the apparent concession of the Attorney General of the State of California below. In *Sibron v. New York*, 392 U.S. 40, this Court disregarded a state's representation of error and reached the merits stating:

> Confessions of error are, of course, entitled to and given great weight, but they do not "relieve this Court of the performance of the judicial function." [Citation omitted.] It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained. For

> one thing, as we noted in Young, "our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties." [Citations omitted.]

Id. at 58.

The same reasoning applies to an apparent concession as to a confession of error.[1]

II

THE SPECIFIC FACTS ARTICULATED BY THE POLICE OFFICERS, ESPECIALLY THE FLIGHT OF THE SUSPECTS, PROVIDED SUFFICIENT REASONABLE SUSPICION FOR AN INVESTIGATORY DETENTION

In *Michigan v. Chesternut*, 486 U.S. 567, 572, this Court found it unnecessary to consider the issue of flight as providing a sufficient reason for an investigatory stop. However, in that same case this Court opined that the attempt to establish a bright line rule on the related issue of the propriety of police chases must fail in that both petitioner and respondent "failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account '"all of the cir-

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1. *Amicus* is mindful of the prohibition against presenting additional questions in an *amicus curiae* brief. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 530, n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960). However it is the position of *amicus* that this prohibition does not apply in the instant case in that the issue of reasonable suspicion for detention was discussed below and has been raised by the respondent in this Court. Respondent's Brief in Opposition to Petition for a Writ of Certiorari, pp. 8-23; see *Bell v. Wolfish*, 441 U.S. at 530, n.13; see also *Toussaint v. McCarthy*, 801 F.2d 1080, 1106, n.27 (9 Cir. 1986).

cumstances surrounding the incident'" in each individual case. [Citation omitted.]" *Ibid.*

Accordingly, *amicus* does not seek to establish flight from the presence of law enforcement personnel as invariably a *per se* reason for detention. Whether flight from police justifies a warrantless investigative stop should be judged on a consideration of the totality of the circumstances in the case before the court. *State v. Jackson*, 147 Wis.2d 824; 434 N.W.2d 386, 388-389 (1989). As stated in *Peters v. New York*, decided concurrently with *Sibron v. New York*, 392 U.S. at 66-67:

> [D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.[2] [Citations omitted.]

In the instant case, two police officers assigned to the Oakland, California, Police Department's Drug Task Force were on patrol at 10 p.m. in the vicinity of Foothill Boulevard and 64th Avenue when they saw four young men huddled together at the side of a small red compact car which was parked at a location known to be an area of high narcotic activity and at an address where both officers had participated in several narcotics arrests. (J.A.[3] 25-26, 36-38.) The officers were in an un-

2. In concurring opinions Justices White, and Douglas stated that in their view the facts in *Peters*, including the flight of the suspects, gave rise to a reasonable suspicion sufficient for a *Terry* stop which ripened into probable cause for arrest only after burglar's tools were found during a pat-down search. *Peters v. New York* decided together with *Sibron v. New York*, 392 U.S. at 69, 70.

3. The abbreviation "J.A." refers to the Joint Appendix filed by the petitioner.

marked brown Dodge but they were wearing standard task force uniforms, blue jackets with the word police written on the front and back, blue jeans, gun belt and tennis shoes. (J.A. 26, 37.) As the officers turned their car in the direction of the red compact car, four young men ran off and the car drove off quickly. (J.A. 27-29, 37.) The officers had not activated any emergency equipment or said anything to the individuals prior to the red car speeding off and the young men running. (J.A. 28-29, 39.) By the time Officer McColgin, who was the driver, stopped the car, all of the individuals were out of sight. (J.A. 41.) Officer Pertoso then left the car and ran in a manner to cut off one of the fleeing youths, respondent, Hodari D. (J.A. 41.) When Officer Pertoso located respondent, respondent was running towards him but looking over his shoulder as if to ascertain whether or not someone was following him. (J.A. 41.) When Officer Pertoso reached a position approximately 11 feet in front of respondent, respondent turned in the officer's direction, a startled look came over respondent's face, and respondent in an underhand scooping motion discarded what appeared to the officer to be a single loose rock of cocaine. (J.A. 42-44, 45.) Respondent continued towards Officer Pertoso who, having identified the object thrown as a suspected piece of rock cocaine, forced respondent toward the ground and handcuffed him. When the piece of rock cocaine was retrieved, the respondent was placed under arrest. (J.A. 42-44, 106.)

Neither officer had seen any objects or currency change hands between or among the individuals surrounding the red car, nor had they recognized any of the individuals who ran immediately upon the officers' approach in an unmarked car. It was Officer Pertoso's intention to cut off one or more individuals who had run in order to contact them and find out what they were about. (J.A. 35, 44-46.) Officer McColgin retraced the route that respondent had run and found a stash of 15 pieces of suspected rock cocaine. (J.A. 30-31.) Officer

Pertoso searched respondent pursuant to his arrest and recovered $130 in U.S. currency and a pager. (J.A. 106.)

In the *Peters* case, Peters was apprehended in possession of burglar's tools. A police officer was at home in his New York apartment when he heard a noise at his door as he was drying himself off after a shower. His investigation of the noise was interrupted by a telephone call. After the telephone call, he looked through the peephole of the door to the hallway and saw two men tiptoeing in the hall in a furtive manner. The officer had lived in the building for 12 years and did not recognize these men as tenants. The officer called the police, put on civilian clothes and armed himself with his service revolver. He again looked through the peephole to find the two men continuing to look about the hallway. The officer entered the hallway, slamming the door behind him. The two men immediately fled down the stairs upon the slamming of the door. The officer gave chase. He apprehended Peters between the fourth and fifth floors, grabbed him by the collar, and continued down another flight in an unavailing pursuit of the other man. Peters attempted to explain his presence in the building by saying he was visiting his girlfriend, but he declined to give her name on the ground that she was a married woman. The officer patted Peters down for weapons and discovered burglar's tools. *Sibron v. New York*, 392 U.S. at 48-49.

As noted above, this Court considered the flight of these individuals at the approach of the officer, even though he could be characterized as a mere stranger in civilian clothes, as a "strong indicia of mens rea." 392 U.S. at 66-67. This Court also found that the suspicious behavior of these individuals, coupled with their flight, constituted not only reasonable suspicion for detention but probable cause for arrest. *Id.* at 66-67, 79.

In *United States v. Green*, 670 F.2d 1148 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia found probable cause to arrest where the defendant was observed by an experienced member of a drug enforcement unit to accept currency from an accomplice and supply the accomplice with an object which the accomplice then gave to an unidentified man who had given the accomplice the money. Defendant Green had retrieved the object from a brown paper bag which he subsequently placed in his jacket pocket. Believing that he had observed a drug transaction, the drug enforcement officer radioed a description of Green who was approached by two undercover officers in an unmarked patrol car. Apparently recognizing either the unmarked patrol car or the officers as they approached, the defendant ran quickly into a restaurant looking over his shoulder at one of the officers. The defendant moved his right hand five or six feet inside the restaurant, removed his hand and proceeded to back out the door. As he exited he was arrested and a brown paper bag was found at a point consistent with where the defendant had moved his right hand. *Id.* at 1150-1151. The court found probable cause not merely to detain, but to arrest based upon the interaction between the defendant, his accomplice and another unidentified individual, the surreptitious movements of their hands in an apparent attempt to conceal the object of exchange, and the "*appearance of flight and evasion*" (*id.* at 1151, emphasis added) by Green at the approach of undercover officers. The court noted that none of these indicia of criminality, standing alone, would constitute probable cause for arrest, but that a combination of these factors, including apparent flight, was sufficient to constitute reasonable cause not only for detention but for arrest. *Id.* at 1151-1152.

In both of these cases the flight of the suspect was not induced by any action on the part of the police. Where flight is not induced or provoked by police conduct it is a strong indication of a guilty mind. 3 LaFave, Search and Seizure (2d

ed. 1987) § 9.3(c), p. 449, fn. 150. Other courts have held that flight alone, at the mere approach of the police unprovoked by any police conduct, constitutes a reasonable cause for a brief investigatory stop. *State v. Anderson*, 155 Wis.2d 77, 454 N.W.2d 763 (1990) [defendant's conduct in driving rapidly away after sighting squad car was flight from police which was sufficiently suspicious behavior to justify temporary investigative stop]. In *Michigan v. Chesternut*, 486 U.S. 567, 576, Justice Kennedy in a concurrence, joined by Justice Scalia, stated, "respondent's unprovoked flight gave the police ample cause to stop him." Between the finding of probable cause to arrest espoused in *Peters* and *Green*, and the detention based on no more than flight in *Anderson* and the *Chesternut* concurrence, lies the instant case.

Assuming, arguendo, that respondent was detained when he turned his head and found Officer Pertoso advancing on him wearing a jacket emblazoned with the word police some 11 feet away, and that at that moment he had been seized in the sense that his freedom of movement had been restrained by the show of authority, *United States v. Mendenhall*, 446 U.S. 544, 553-554 (1980), reasonable cause for that detention lay in the totality of the circumstances which presented themselves to the police.

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances -- the whole picture -- must be taken into account. Based upon that whole picture the detaining officers must have a particularized and

> objective basis for suspecting the particular person stopped of criminal activity. [Citations omitted.]
>
> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions -- inferences and deductions that might well elude an untrained person.
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact finders are permitted to do the same -- and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.
>
> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in Terry v Ohio, supra, said that "[t]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth*

Amendment jurisprudence." [Citation omitted] (emphasis added). [Citations omitted.]

United States v. Cortez, 449 U.S. at 417-418.

Amicus submits that when an officer possesses information and makes observations that cause him to reasonably suspect, based upon his training and experience, that an individual or a group of individuals has committed, is committing or is about to commit a crime, and that individual or group flees from the mere presence of the officers, unprovoked by any conduct of the officers other than their arrival on the scene, no further particularity or specificity is required to initiate an appropriately circumscribed investigatory detention of that individual or group of individuals.

As stated by the Wisconsin Supreme Court, the facts in *Terry v. Ohio*, 392 U.S. 1 (1968), were no more than an officer watching "the defendant and another man repeatedly walk back and forth in front of a store window at 2:30 in the afternoon, and then confer with each other." *State v. Jackson*, 147 Wis.2d 824, 434 N.W.2d at 389. The Wisconsin court also quoted *Adams v. Williams*, 407 U.S. 143, 145-46 (1972):

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

State v. Jackson, 147 Wis.2d 824, 434 N.W.2d at 389.

Similarly, in the instant case, the narcotics officers, who observed four young men huddled at the side of an occupied automobile, in an area of high narcotics activity at 10:00 p.m. at an address where the same officers had made arrests for drug sales, were justifiably suspicious. When the youths ran and the car departed at a high rate of speed merely because the officers' car turned the corner in their direction, that suspicion ripened into reasonable cause for a brief detention. The fact that the officers had not seen any objects change hands at the side of the car does not alter their right to detain. If, in addition to their other observations, they had seen objects exchanged they, arguably, would have had probable cause for an arrest. *United States v. Green*, 670 F.2d at 1150-51.

In *People v. Brown*, 216 Cal.App.3d 1442, 265 Cal.Rptr. 552 (1990), officers saw the defendant standing in a crowd in front of a dance hall holding a paper bag. The group was standing in a semi-circle around the defendant who held the bag out toward the group, apparently displaying something to the other individuals in the group. The officers could not tell what was in the bag, and did not see any exchange take place. Some people yelled out roller, a term for a policeman, and the crowd dispersed. The officers left the area and called for backup. When they returned approximately five minutes later, the defendant was again standing in front of the dance hall. The police stopped their vehicle and the defendant quickly went back inside the dance hall. At that point an officer went in after him and saw him drop the paper bag and take off again past the police. *Id.* at 1445-1446, 1450. As the court noted in *Brown*:

> In an earlier day before the traffic in illicit drugs became endemic to our society, the above circumstances might not -- and probably would not -- have been

> consistent with criminal activity. Unfortunately, times have changed, and a multitude of controlled substances are openly bought and sold on our streets and in our neighborhoods. To any police officer knowledgeable of such conditions, the circumstances above described would not only raise, but almost compel, a reasonable suspicion that conduct "consistent with criminal activity" was taking place.

Id. at 1450.

In *United States v. Sharpe*, 470 U.S. 675 (1985), this Court upheld the stop of a pickup truck traveling in tandem with a passenger car for some 20 miles in an area of the North Carolina coastline known to be frequented by drug traffickers. An experienced agent testified that pickup trucks with camper shells were often used to transport large quantities of marijuana. The pickup truck appeared to be heavily loaded, and the windows were heavily covered to obstruct outside viewing. After following the vehicles for 20 miles the agent decided to make an investigative stop and radioed the state highway patrol for assistance. When a marked patrol car reached the suspected vehicles, they abruptly turned off the highway, and traveled down a campground road in excess of the speed limit. After the two vehicles reentered the highway, the marked patrol car was successful in pulling over the passenger car, but as he did so, the pickup truck accelerated and fled the scene. The pickup truck was ultimately stopped. *Id.* at 677-679, 683.

The principle issue in that case was the length of the pre-arrest detention of the persons driving the passenger car and the pickup truck. However, the Court found the flight of the pickup truck to be a significant factor in upholding both the investigatory detention itself and the length of that detention. The Court stated:

> Agent Cooke had observed the vehicles traveling in tandem for 20 miles in an area near the coast known to be frequented by drug traffickers. Cooke testified that pickup trucks with camper shells were often used to transport large quantities of marihuana. . . . Savage's pickup truck appeared to be heavily loaded, and the windows of the camper were covered with a quilted bed-sheet material rather than curtains. Finally, both vehicles took evasive actions and started speeding as soon as Officer Thrasher began following them in his marked car. See n.1, *supra*. Perhaps none of these facts, standing alone, would give rise to a reasonable suspicion; but taken together as appraised by an experienced law enforcement officer, they provided clear justification to stop the vehicles and pursue a limited investigation.

Id. at 683, n.3.

The totality of the circumstances giving rise to a detention in *Sharpe* are quite similar to the facts of the instant case in which experienced members of a drug task force observed activity consistent with narcotics transactions in an area of high narcotics use, at a particular location where they had previously made narcotics arrests, followed by the flight of all of the participants, including the car parked at the curb, at their mere approach.

As the Court noted in *Sharpe*:

> The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures. The authority and limits of the Amendment apply to investigative stops of vehicles such as occurred here. *United States v. Hensley*, 469 U.S. 221, 226, 105 S.Ct. 675, 679, 83 L.Ed.2d 604 (1985); *United States v.*

Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 694, 66 L.Ed.2d 621 (1981); *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 139, 1401, 59 L.Ed.2d 660 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 880, 95 S.Ct. 2574, 2578, 2579, 45 L.Ed.2d 607 (1975). In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), we adopted a dual inquiry for evaluating the reasonableness of an investigative stop. Under this approach, we examine

> "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, at 20, 88 S.Ct., at 1879.

As to the first part of this inquiry, the Court of Appeals assumed that the police had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marihuana trafficking, given the setting and all the circumstances when the police attempted to stop the Pontiac and the pickup. 660 F.2d, at 970. That assumption is abundantly supported by the record. [Footnote omitted.]

Id. at 682.

Professor LaFave discusses an empirical study which states that a person who flees at the sight of a police officer will most likely be detained. 3 LaFave, Search and Seizure (2d ed. 1987) § 9.3(c), p. 448, fns. 144 & 145.[4] As stated above, un-

4. All of the parties and the California State Court of Appeal's opinion below take the position that, although the officers were in an unmarked car, they were wearing police jackets and that respondent and the other suspects fled, assuming that they were the police. Professor LaFave (continued...)

provoked flight by a suspect at the approach of others has long been considered as evidencing a guilty mind. *Peters v. New York*, 392 U.S. 40, 68. Whether that detention is justified depends upon the totality of the circumstances. *United States v. Cortez*, 449 U.S. at 417-418; *State v. Jackson*, 434 N.W.2d at 388-389. Where one of the circumstances is the immediate flight of a suspect, unprovoked by any official conduct other than the arrival of officers on the scene, little more is needed by way of articulable facts to justify an investigatory detention. See *State v. Jackson*, 434 N.W.2d 386; *Commonwealth v. Sanchez*, 403 Mass. 640, 531 N.E.2d 1256 (1988) [defendant fled after initially giving permission for a search]; 3 LaFave, Search and Seizure (2d ed. 1987) § 9.3(c), pp. 448-451, notes 143-164, 1990 Pocket Part pp. 44-45 and cases collected therein. The existence of some evidence of criminal activity, however, assures that the officer is acting on reason rather than mere instinct in chasing an individual who runs or otherwise takes flight in the presence of police authority. See *e.g.*, *Hinton v. United States*, 424 F.2d 876 (1969); *State v. Talbot*, 792 P.2d 489 (Utah App. 1990).

In *People v. Shabaz*, 424 Mich. 42, 378 N.W.2d 451, (1985), the Supreme Court for the State of Michigan disallowed an investigatory stop in which plainclothes police officers driving an unmarked vehicle observed defendant Shabaz leaving

4. (...continued)
takes the position that flight by suspects can be taken into account as indicia of wrongdoing only if the suspects are aware that the person or persons approaching are in fact police. 3 LaFave, Search and Seizure (2d ed. 1987) § 9.3(c), p. 448, fn. 143. However, this Court stated in *Peters* that "furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea." *Peters v. New York* decided with *Sibron v. New York*, 392 U.S. 40, 68. While the certainty of a suspect's recognition of the person approaching as a police officer may cause a court in a particular case to give that suspect's flight greater weight, any ambiguity concerning the suspect's knowledge of the identity of an individual from whom he flees should not cause a court to simply disregard the suspect's flight as a factor in deciding whether an investigatory detention was reasonable.

a building in the city of Detroit. Although the officers had not received a report at that time of any felony having been committed in the vicinity of the building by anyone fitting the description of the defendant, one of the officers testified that in his 11 years on the police force he had made 5 or 6 arrests for concealed weapons offenses and approximately 10 drug arrests at that same address. When the defendant left the building he was carrying a small paper bag. As the police vehicle caught up to the defendant, the defendant looked in the officer's direction and immediately began stuffing the paper bag in a vest or in his pants. When the vehicle had almost come to a stop at the defendant's location, the defendant immediately started to run. The officers chased him, and after catching him, went into a vestibule of a building into which the defendant had run, and found a closed brown paper bag containing a handgun. One officer testified that he believed that the defendant was hiding either a weapon or narcotics at the time he stopped the unmarked police car. 378 N.W.2d at 453. The majority opinion of the Michigan Supreme Court listed all of the factors which could give rise to a reasonable suspicion for detention, including the flight of the defendant, and then proceeded to argue away each of the factors individually as equally indicative of innocent behavior to reach the result that an impermissible *Terry* stop had been made. 378 N.W.2d at 459-461. The dissent in that case properly concluded that a consideration of the totality of the circumstances supported an investigatory detention of the defendant:

> [S]ince *Terry*, the Supreme Court has consistently held that the "reasonable suspicion" required for a valid investigative stop must be judged by the totality of the circumstances at the time of the incident. As the majority observes, this totality has been specifically held to include the experience and heightened perceptions of the police officers involved, *United States v. Cortez*, *supra*.

It is true that *flight* alone cannot give rise to probable cause, since, were it otherwise, anyone who does not desire to talk to the police and who either walks or runs away from them would always be subject to legal arrest. LaFave, Search and Seizure, § 3.6, p. 669.

It is also true that concealment itself may be insufficient to justify a stop. *Id.* The majority has not, however, set forth authority justifying the conclusion that, in combination, the observation by experienced police officers of concealment and flight may not provide a reasonable suspicion that criminal activity is occurring. Indeed, the case cited by the majority, *United States v. Green*, 216 U.S.App.D.C. 329, 670 F.2d 1148 (1981), not only does not support the conclusion of the majority that the officers had only a generalized suspicion, it is actually a holding that the officers' observation of activity typical of a narcotics transaction, the concealment of a brown paper bag and the flight and evasion by defendant when approached by an unmarked police car, constituted probable cause for arrest. *Id.* at 332, 670 F.2d 1148.

The majority has discredited the inference which reasonable police officers might draw and has bifurcated the circumstances to conclude that the sum of the circumstances is not "greater than the sum of their parts." (Slip op. p. 11.)

The purported justification for their conclusion is that each circumstance may have been innocent. This analysis obscures the significance of the officers' experience and renders the totality of circumstances test meaningless.

378 N.W.2d at 465.

This Court granted certiorari in the *Shabaz* case, 475 U.S. 1094 (1986), but later dismissed certiorari as moot after the defendant died. 478 U.S. 1017 (1986). As shown by the facts of *Shabaz* and this case, guidance by this Court is necessary concerning the issue of flight in the realm of the totality of the circumstances presented in a given case. If the importance of flight unprovoked by the conduct of the police is given proper weight, and other indicia of criminal activity are present, these factors should suffice to create the necessary conditions for an investigatory detention and would provide a standard for lower courts to follow. Some indicia of suspected criminal activity plus flight provides a basis for detention which is as substantial as a detention based upon the drug courier profile which was recently upheld by this Court in *United States v. Sokolow*, 490 U.S. 1 (1989).

CONCLUSION

Flight from the presence of police officers which is not induced or provoked by conduct on their part, does not by itself provide reasonable cause for the detention of the individual who has fled. However, if in assessing the totality of the circumstances confronting the police officer any indicia of criminality is reasonably found in addition to such flight, then the requirement of a particularized and specific suspicion of criminal activity has been satisfied by the flight of the suspect. Whether equal weight should be given where the police officers are traveling in an unmarked car or are wearing civilian clothes should be the subject of case by case analysis based upon the totality of all the circumstances surrounding the detention.

Respectfully submitted on behalf of the
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF CALIFORNIA,
Petitioner,

-v-

HODARI D.,
Respondent

On Writ of Certiori
To the Court of Appeals of
California

BRIEF OF WAYNE COUNTY PROSECUTING ATTORNEY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF QUESTION

MAY ONE WHO FLEES FROM THE PRESENCE OF POLICE COMPLAIN WHEN THE POLICE SEIZE PROPERTY THAT HE DISCARDS ALONG THE WAY?

STATEMENT OF THE CASE

Amicus relies upon the parties to provide this Court with the particulars of the instant case.

INTEREST OF THE AMICUS

Amicus is the Prosecuting Attorney for Wayne County, Michigan. Wayne County is the largest County in the State of Michigan, and its criminal court, Detroit Recorder's Court, is among the largest and busiest in the entire United States. Charged with responsibility for litigating all criminal prosecutions within his jurisdiction, the outcome of the current litigation is a matter of primary interest to Amicus, as the precise question involved in this case has arisen often in cases to which Amicus has been a direct party -- including, most recently, the case of People v Mamon, 435 Mich 1; 457 NW2d 623 (1990).

SUMMARY OF ARGUMENT

A chase, being neither a search nor a seizure, cannot violate any provision of the Fourth Amendment.

Moreover, unprovoked flight from the presence of police invites their pursuit; and if one breaks no law by running, the police break no law simply by following.

ARGUMENT

I.

ONE WHO FLEES FROM THE PRESENCE OF POLICE MAY NOT COMPLAIN WHEN THE POLICE SEIZE PROPERTY THAT HE DISCARDS ALONG THE WAY.

"The wicked flee when no man pursueth...."

Proverbs, 28:1

In this case the Court once again confronts the nature of a seizure, and will therefore reexamine its holdings in Michigan v Chesternut, 486 US 567; 108 S Ct 1975; 100 L Ed 2d 565 (1988) and Brower v Inyo County, 489 US ___; 109 S Ct 1378; 103 L Ed 2d 628 (1989) to consider the view of the California Court

of Appeals that a citizen is "seized" for purposes of the Fourth Amendment as soon as the police begin to chase him.

Given the holding below, it is apparent that this Court must intervene to curtail the overly expansive construction of the word "seizure" in the context of the Fourth Amendment, and return to the common understanding of the word. As shown below, in doing so the Court will be aligning the Constitution with practice throughout most of the country, and also with such nonjuridical authorities as Webster, Oxford, and Random House.

A.

WORDS AND THE CONSTITUTION

"[W]hen their task is to interpret and apply the words of a statute, [the] function [of judges] is merely academic to begin with -- to read English intelligently...."

Oliver Wendell Holmes, dissenting in Northern Securities Co v United States, 193 US 197, 401; 24 S Ct 436; 48 L Ed 679 (1904).

"'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean -- neither more nor less.'"

Carroll, Through the Looking Glass, Ch. 6.

Quite aside from the legal arguments on the question of "investigatory pursuits," which Amicus is confident the parties will address in their respective pleadings, a consideration of the common English meaning of the terms at issue leads to the conclusion that the lower court erred in its resolution of this case.

From the Medieval Latin word "sacire," meaning to place, the early French, even then in the process of blurring and ennasalizing the Language of the Caesars, took their word "saisir," which meant "to seize." Following the Norman Conquest, and the resulting infusion of Old French into the primitive Saxon tongue, inhabitants of early England found their word "saisen," which is the modern root of our own word "seize." From this, the law gets the concept of "seizen" or, in Britain, "seison" -- the possession of land or chattels, characteristic of freehold estates. And modern English usages reflects the ancient notion of forceful possession: Webster's defines "seize" as "to take possession of....to possess or take by force," Webster's Third New International Dictionary (Unabridged), (1986), 2057; Random House defines a "seizure" as the "act or an instance of seizing," or as "taking possession of an

item, property, or person legally or by force," or as "a sudden attack, as of epilepsy or some other disease." The Random House Dictionary of the English Language (Unabridged 2d Ed), (1987), p 1735. And Oxford defines "seize" as "to put into possession," and "seizure" as the "act of seizing." IX The Oxford English Dictionary, (1961), 402-404. Commonly recognized synonyms of "seize" include the notions of "arrest" and "apprehension," as well as "grabbing" and clutching," while common antonyms include, in various forms, the concept of "release." Random House, supra; Webster's, supra. See also, Roget's International Thesaurus (Fourth Edition, (1979), sec's 761.15, 822.14. By the late Eighteenth Century, it is beyond question that the legal concept of "seizure" included in the Fourth Amendment contained the same notions of dominion and control that had come to dominate the Law of Property. Cf,

Pierson v Post, 3 Caines 175 (NY, 1805). Therefore, the Constitution's protections against "unreasonable seizures" necessarily contains an element of physical possession which the present case appears to lack. One sees this clearly by analyzing the concepts which the lower court equated with "seizure" -- the twin notions of "chase," and "pursuit."

Though each contains slightly different connotations in modern English, both "pursuit" and "chase" imply an active, rather than passive, attempt to overtake an objective or outrun an adversary. "Chase," stemming from the same Vulgar Latin root -- "captiare," to hunt -- which has given us the words "catch" and "capture," implies a more transitory occupation, to the end of attaining a specific end: "the chase," being a synonym for "the hunt," implies a series of acts undertaken in pursuit of a

given object; and one "chases" a person or thing, hoping for attainment, in that capturing the goal of the chase fulfills its objective. "Pursuit," on the other hand, implies a longer-standing commitment: although one may pursue any transitory object, one "pursues" happiness or excellence in a different manner than one "chases" a fox during a foxhunt, or "chases" after a rainbow; and the word's roots, from the latin "prosequi," to follow or pursue, is the source of other words implying long-term, glacially-paced, or open-ended commitments even in the field of law -- such as "sue" or "prosecute." Random House, supra at 349, 1570.

Given the specific limitation of the Fourth Amendment to "unreasonable searches and seizures," extending the notion of "seizure" to include "chases" or "pursuits" appears to do violence to both the letter and intent of the

Amendment: the freedom of the quarry prior to its reduction to possession is an elementary principle of the Law. Pierson v Post, supra. And a "seizure" -- the exercise of physical dominion over a person or thing -- implies the successful termination of a pursuit, not its onset. Moreover, unless one adopts the notion that the Judicial Powers of government include the right to rewrite any text, whether statutory or Constitutional, which does not accord with the Judiciary's institutional or subjective preferences, one must accept the limitations of language placed upon words enacted into law; and rejecting such notions of judicial limits means rejecting the wisdom -- as well as the enacted Law -- of prior generations.

The imprecision of language was not a problem with which the Framers of the Constitution were unfamiliar. In The Federalist, Madison wrote perceptively of

the limitations of speech as a medium of communication. "The use of words is to express ideas," he wrote in The Federalist:

> "Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty Himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloud medium through which it is communicated." Madison, The Federalist, Number 37.

Within the limits imposed by the imperfections of human language, courts have both a unique power, and a burdensome responsibility: though it is

the Judiciary that gives substance to Law, through the power of adjudication, a court's first responsibility is to give form and weight to the Lawmaker's intent. While this implies the need for constant attention to detail, applying the rules of society in the context of the infinite diversity of creation, cf, Porter v C O Porter Machinery Co, 336 Mich 437; 58 NW2d 135 (1953), it requires the judge to apply not his own subjective preferences, but those of the Lawmaker's, and to adopt not the construction best suited to the judge's personal conception of Justice, but rather to enforce the law given him by statute, constitution, or precedent. See, eg, Holland v Heavlin, 299 Mich 465; 300 NW 777 (1941); People v Barltz, 212 Mich 580; 180 NW 423; 12 ALR 520 (1920).

While it is doubtful that the Framers anticipated the revolution in transportation and communication that has transformed our country, it is often

possible to apply their underlying principles of government to many of the cases arising today, and to the extent that this is possible, there is no need for further guidance from the Legislature or the people. However, in dealing with such concerns, courts are not free to disregard History in favor of furthering their own subjective points of view. And where the policies underscoring the provisions of the Constitution conflict with a judge's own preference, it is the Constitution -- the Framer's policy choices, as reflected in the Framer's own language -- which must control. Cf, Decher v Vaughn, 209 Mich 565; 177 NW 388 (1920)(Words used in constitution to be given natural and popular meaning used by people who adopted it); Manthey v Vincent, 145 Mich 327; 108 NW 667 (1906)(Fear of consequences is no reason for declining to give Constitutional provision its intended meaning, the remedy for unwise policies properly being

within People's prerogatives as sovereign).

The concept of "hue and cry" being as old as the Common Law, 4 Blackstone, Commentaries, 293; see V Oxford, at 436-437,[1] and the tradition of the hunt being an important part of the English heritage,[2] it is inconceivable that the Framers simply confused the concepts of "chase" and "seizure;" it is, after all, folklore wisdom that a "bird in the hand is worth two in the bush" -- and our culture has long recognized the essential difference between practical accomplishment, and unrealized potential. Equally unlikely is the notion that by limiting the Fourth Amendment to "searches and seizures," they also intended to prevent "chases," since the

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1 Amicus is aware of no recorded case in which a thief who was never caught was actually hung for his crimes.

2 Neither is Amicus aware of any known instance of a hunting trophy taken from an animal which successfully avoided the hunter.
See infra, pp 32-33.

term is not implied by the concept of either "search" or "seizure," and the degree of intrusiveness stemming from a policeman following someone on a public street hardly approaches the level of an actual seizure -- except for one with a guilty conscience, to whom any approach will be a threat, and apprehension anticlimactic. Cf, Poe, The Tell-Tale Heart, (1845).

Therefore, on strictly linguistic terms, it appears that the lower court erred in deciding this case, and that this Court should rectify the matter without further delay.

B.

ANALOGUES AND ILLUSTRATIONS

While the concept of "chase" does not imply a successful "seizure," and simple logic would discount the likelihood that one engaged in flight

does not claim the right to flee,[3] the life of the law is not logic, but experience. Holmes, The Common Law, (1923), p 1. Even so, a brief look at examples from human experience suggests that the lower court took an overly expansive view of the term "seizure," and that this Court should intervene to return the Constitution to conformity with standard English usage.

1.

The Besieged Fortress

The distant whine of a lonely dog greets the grayness of daybreak. A mist rises from the puddled streets, still damp from the early morning rain. The darkened window, closed against the chilled night air, shows no sign of stirring inside. Across the road, the empty branches of an old, dying tree shake softly against the coming wind.

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[3] See United States v Mendenhall, supra at 554 (Opinion of Stewart, J)(Person is seized "only if, in view of all the circumstances..., a reasonable person would have believed that he was not free to leave").

A majority of the Court subsequently adopted Justice Stewart's formulation. See, eg, INS v Delgado, supra and Michigan v Chesternut, supra.

Suddenly, an angry voice shatters the stillness.

"Come out with your hands up! You are surrounded -- give yourself up!"

By force of law or force of arms, a siege is one of the ancient tools of conflict, by which opposing forces contend, matching the strength of the besieger against the resolve of the besieged. A siege, by its nature, implies some level of physical control by the besieging party: those besieged cannot ordinarily leave of their own free will, and often depend upon their adversary's grace or sense of humanity for the necessities of their own survival -- such as food and water.

Even so, and despite the fact that the besiegers have attained a measure of physical control over their target, history teaches us that a "siege" does not imply a "capture" -- and, in fact, it is the besieged's act of defiance that causes the standoff in the first place.

Moreover, the lessons of the past show that the end result of a "siege" is far from certain -- and it is that very uncertainty that raises hope in the breasts of the besieged, and inspires them to continue their resistance.

Amicus submits that the historical record shows that a "siege" -- even by overwhelmingly superior numbers -- does not constitute a "seizure." On the contrary, a "seizure" occurs in the face of resistance only when the resistance is overcome by the application of force, as at Troy[4] or the Alamo,[5] or by the surrender of the resistor, as at Yorktown.[6] Cf, Brower v Inyo County,

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[4] See Homer, The Iliad, Books XII-XXIV; Virgil, The Aeneid, Book II.

[5] See Tinkle, 13 Days to Glory: The Siege of the Alamo, (1958).

[6] See Middlekauf, The Glorious Cause: The American Revolution, (1982) at 559-570.

supra. A different view, holding a "seizure" effective at the onset of the siege, would require overturning the results of Dunkirk[7] and Bastogne[8] -- and reopening questions settled on the battleground is beyond the jurisdiction of any court of law.[9]

2.

The Beleagured Fox

"Yoicks!"

Leaping boldly over a row of hedges, Buffington was the very picture of lordly splendour. Trimmed brightly in immaculate scarlet, his proud horse a vision of equine peerage, he cheered the hounds on to glory. A good way behind, the huntsman kept the rest of the party at a respectful distance; one did not, after all, outrace a Buffington.

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[7] See Churchill, Blood, Sweat, and Tears, (1941) "Speech to the House of Commons, June 4, 1940," pp 289-297 (Noting that the British Army escaped).

[8] See Eisenhower, Crusade In Europe, (1948), pp 342-365 (Noting that the siege was broken).

[9] See Middlekauf, supra at 451, for insight into the results of British efforts to suppress the American revolution through the use of proclamations.

Not on his own grounds.

And certainly not on a hunt.

"Yoicks!" he cried again, guiding his horse over yet another hedge -- this one separating his Northern Estate from his housekeeper's garden. Clomping regally through a row of cabbages, ignoring the clamourous squawks of the rabble who lived in the nearby cottage, he spurred his horse ahead, not wishing to fall too far behind the dogs.

The hounds were baying loudly this time, more loudly than ever. The fox's scent must be strong, mused His Lordship; so much the better. The morning rains had dampened the grounds, and all this clop-cloping about was soiling his boots. Best to lay into the rotter at once, he thought. It was getting rather close to tea time, anyway. And the bloody saddle was giving a spot of bother to his lordly underside.

The hounds bounded over the stone fence that stood at the boundary of the Western Estate. The little bugger must be getting tired, he smiled; no fox could run forever. And they were nearing the Bog. The devil would be trapped -- hemmed in on all sides. Then he could send the dogs in for the kill. He neared the fence in glorious anticipation.

"Yoi--ya--ha--hooey!" cried Lord Buffington, as he soared over the hurdle, sailing magnificently from his vision of equine peerage -- the horse having entertained sudden reservations about following His Lordship into the mud fields where the hounds lay, foundering and squirming in the mire.

From a vantage a quarter-mile from where he'd doubled back over his trail, his rest over, a small reddish animal picked himself up and trotted across an open meadow, into the forest.

From its roots in 15th Century England, modern foxhunting developed into an upper-class pastime in 19th Century Britain. The Huntsman, sending his 15-20 hounds after a suspected fox, would lead a small, elite band of riders[10] through glen and dale, over hills and across gulleys, seeking the small, reddish canine known as vulpes fulva -- or, in common parlance, the "fox." Upon spotting a fox, a hound would bay, while human participants would signal by sounding horns and crying "Tally-ho." This was the signal for the pursuit to begin in earnest; and, if successful, the Huntsman would award any remaining parts or pieces of the fox as trophies to those of his party whom he deemed worthy of such high honors. 4 Brittanica, 912-913 (1988); 10 Colliers, 245-248 (1987). See

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10 At a traditional fox hunt, those of the true upper crust were clad in scarlet coats; those of lesser rank, if invited at all, wore black. Brittanica, supra.

Amicus could find no study purporting to show whether the fox cares at all about the rank or peerage of his pursuers, but one rather doubts it.

generally, Seth-Smith, Steeplechasing & Foxhunting, (1977).

The fox, at least, seems to know the difference between being chased, and being torn to shreds by a pack of dogs.[11] In fact, one could come to suspect that this is rather the point of the whole affair in the first place: one authority notes that many foxes actually seem to enjoy their role in the "hunt," often opting against the easy avenue of escape in favor of letting the chase continue. Colliers, supra at 245. In any case, the fact that most foxes escape, ibid at 247, seems to militate against the holding of the lower court.

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11 For an application of the principles of the "hunt" to homo sapiens, see Faulk, The Geronimo Campaign (1969)(Cronicling efforts of 5,000 soldiers to "seize" Indian band consisting of 18 men, 13 women, and 6 children) and Beal, "I Will Fight No More Forever": Chief Joseph and the Nez Perce War (1963)(Outlining 1700-mile effort of Indian tribe to avoid combat with United States Army forces and escape into Canada, culminating in "seizure" 40 miles from border).

3.

The Bedraggled Lions

"Fourth and twenty-six, ball on the Detroit 37-yard line. Lions trail the 49ers, 20-16; thirty-seven seconds of playing time remaining. Neither side has a time out left.

"Peete breaks the huddle. Lions line up in the Silver Stretch. San Francisco's in the Prevent Defense, trying to guard against the Bomb. Clock ticking away; Peete calls the signals. Looks like he may be calling an audible. He takes the snap and drops back.

"Peete steps into the pocket -- he's looking deep. But the 49er zone is holding. There's no one open -- and the pass rush breaks through! Peete scrambles desperately, looking for a receiver. He dumps the ball off to Barry Sanders at the line of scrimmage.

"Sanders breaks a tackle and takes off down the sidelines. He gets a block -- and he's off to the races! He's at the 50-! -- the 45-! -- the 40-! There's only one man who can stop him -- angling now to cut him off -- the 30!-- the 25!-- and it's a foot race to the goal line...!"

Under the lower court holding in this matter, a seizure occurs "when the officer takes action to prevent a citizen's exit," and that given a citizen's exercise of his "right to leave

at the approach of police," the ensuing detention begins "as soon as [one sees] the officer running toward him." In re Hodari D, supra at 265 Cal Rptr 83, 84. Under this analysis, a fleer's own subjective motivation is immaterial, and his unwillingness to submit to the pursuer's demonstration of intent has no relevance to the question of seizure. Thus, he is "constructively" seized at the moment the chase begins, and the Law will admit no argument to the contrary: as "pursuit itself...[is] effectively [a] seizure," People v Shabaz, 424 Mich 42, 66; 378 NW2d 451 (1984) cert dism as moot on resp's death 478 US 1017; 106 S Ct 3326; 92 L Ed 2d 733 (1985) ovrld in People v Mamon, 435 Mich 1; 457 NW2d 623 (1990) it follows that a citizen is seized as soon as the police begin to chase him. Applying such a rule to everyday life, we should find that in the ordinary course of events, dreams are achieved at the moment of conception;

each goal we pursue through life is ours merely by wishing; and a football player is tackled not by the application of physical force, but by his opponent's act of will.

The weaknesses of such a view are readily apparent. It is, after all, accomplishment, rather than effort, which wins most of the prizes in life: an Olympic medal goes to the runner who runs the fastest, not to the one who runs the pluckiest race; and it is the effortless genius of Mozart, rather than the persistently plodding mediocrity of Salieri, whom we reward with our undying esteem. Effort, however noble or heroic, achieves value only as a means toward accomplishment -- for it is pointless and empty as an end in itself, and depends upon some transcending goal to give it meaning.

Striving, therefore, is not the same

as attainment; and any law which equates the two has divorced itself from the human reality that gives it vitality and purpose.

C.

FLIGHT, SUSPICION, AND REASON

While unnecessary to the resolution of this case, the lower court's opinion raises several points which warrant further discussion.

The underlying premise of California Court of Appeals was that a citizen's act of fleeing from the presence of police does not justify any police interest. In re Hodari D, supra at 265 Cal Rptr 84. This accepted as a given, and the Court concluding that a chase was really a seizure, it followed that the "the facts knows to the officers at the time they began [the] chase...did not constitute specific and articulable facts," In re

Hodari D, supra at 85, which provide "a reasoned, articulable basis to conclude that criminal activity was afoot...." People v Shabaz, supra at 63. As shown above, the court having erred in concluding that chases were seizures, an erroneous result was inevitable -- for granting the point that a citizen breaks no law merely by running, elementary logic would hold that the police can break no law simply by tagging along behind. Cf, Michigan v Chesternut, supra. However, this Court may now prevent future errors by recognizing the fallacy in the first erroneous assumption in the syllogism, and acknowledging the fact that while not justifying an arrest, flight does invite pursuit -- and unprovoked flight from the presence of police justifies an inquiry into the reason for such odd behavior.

The insight that a guilty conscience can cause one to run from shadows is as

old as the Book of Proverbs, 28:1, and as timeless as the wisdom of Juvenal: "This is the first of punishments, that no guilty man is acquitted if judged by himself."[12] Satires, xiii, 2. It was conscience that proved the undoing of the protagonist in The Tell-Tale Heart; and it was Dostoyevsky's realization that torment over one's own misdeeds can exact a heavier burden than the Law that breathed life into Crime and Punishment. Flight is, by its nature, an instinctive act of self-preservation that seeks to remove the actor from the presence of a perceived threat;[13] and if a citizen bolts in unprovoked flight at the sight

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[12] Amicus notes that he was speaking of psychological punishment and honest self-judgment, rather than advocating the wide-scale restructuring of legal institutions.

[13] Cf, Shakespeare, Henry IV, Part I, V, iv, 120 (Noting that "[t]he better part of valor is discretion").
This, in turn, recalls the memorable "Ballad of Brave, Brave, Brave Sir Robin, the Not-Quite-so-Brave-as-Sir-Lancelot," sung by the Worthy Knight's squire in praise of his Master's exploits:
"When danger reared its ugly head,

of the police,[14] it is not unreasonable for them to suspect that his actions stem

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[13](Cont)
"He bravely turned his tail and fled...."
Cleese, Idle, et al, M. Python and the Holy Grail, (1975).
Oddly, neither Mallory nor White records this knight's contribution to Arthur's reign. Mallory, Le Morte D'Arthur, (1470); White, The Once and Future King, (1939). But then, artistic license can excuse a great many minor inaccuracies.

[14] Amicus does not claim that police could provoke a citizen to flee -- for instance, by threats of harassment or physical harm -- and then use his subsequent efforts to avoid trouble as an excuse to detain him. Under those circumstances, however, the citizen's "flight" is readily understandable -- and unreascnable police conduct in provoking one to flee could well render any subsequent seizure and detention unreasonable.
Even so, it would be the act of asserting actual physical control over the unwilling citizen -- by force, or by his coerced acquiescence -- which would constitute the seizure, not the chase itself. Should the citizen be so rash as to discard contraband along the way, it would be his unwise choice of self-help which would prove the source of any subsequent prosecution, rather than the misconduct of the police. It makes no sense, after all, to reward lawbreaking; and if courts are going to grant gratuitous boons to defendants in order to assert control over the police, it makes no sense to bestow such favors on defendants who prefer the remedy of self-help to due process of law.

from a guilty conscience. Michigan v Chesternut, supra at 100 L ed 2d 574 (Kennedy, J, concurring). It is clear, after all, that courts cannot hold the police to impossible standards of prescience or precision, nor require them to form in their own minds the precise legal rationale that hindsight shows the circumstances justify, in order to render their conduct "reasonable" under the Fourth Amendment. Scott v United States, 536 US 128, 138; 98 S Ct 1717; 56 L Ed 2d 168 (1978); People v Arterberry, 431 Mich 381; 429 NW2d 574 (1988). Cf, People v Mitchell, 138 Mich App 163, 167-168; 360 NW2d 156 (1984). And as flight is a sufficiently odd response to the appearance of police to warrant a reasonably prudent officer in concluding that "criminal activity may be afoot," it supplies the "articulable suspicion" necessary to warrant a further inquiry, Terry v Ohio, supra at 21-22, 30, and gives the police ample grounds to detain

the fleer long enough to discover the cause of his flight. Michigan v Chesternut, supra at 100 L Ed 2d 574 (Kennedy, J, concurring).

In any case, granting that courts are the final arbiters of what is "reasonable" under the Constitution, Amicus submits that courts should be careful not to intrude too far into areas beyond their experience or expertise: it is, after all, the police, and not the courts, who deal with crime and criminals on a daily basis; and it is the police, not the courts, who are ultimately charged with keeping our streets safe, and our property secure. Therefore, except under extreme circumstances, courts should respect their experience in determining what actions are necessary or useful to maintain law and order on streets, and to ensure that the rule of Law, rather than that of the Jungle,

prevails in our society. US Const, Art III.

Lastly, Amicus reminds the Court that it is detention, not pursuit, that results in seizure. Michigan v Chesternut, supra; Brower v Inyo County, supra. And in any case, the abandonment of any property seized deprives the defendant of standing to contest seizure.[15] Hester v United States, 265 US 57, 58; 44 S Ct 445; 68 L Ed 898 (1924); People v Kirchoff, 74 Mich App 641; 254 NW2d 793 (1977); Cf, California v Greenwood, 486 US ___; 108 S Ct 1625; 100 L Ed 2d 30 (1988). Abandonment

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15 A presumed causal relationship between a chase and a projected seizure necessarily relies upon speculation about the consequences -- and requires the assumptions of both an ensuing improper detention, and an ensuing improper search. Properly viewed -- given that one may litigate only what happens, and not what might have happened, cf, INS v Delgado, supra at 221 -- an abandonment by a fleeing citizen is a form of self-help, which cannot support the suppression of the item abandoned because of the unforseeable nature of the act.

breaks the chain of causation -- much as a meteor striking Earth does not cause police liability for death of motorist they have stopped unreasonably, who happens to be at the point of landfall. While perhaps responsible for the unjustified detention, they are not responsible for unforseeable consequences -- and much as a bolt from the blue, an ill-advised but otherwise voluntary abandonment of contraband is not a foreseeable consequence of a stop, whatever the justification.

Accordingly, the Court of Appeals holding below is not based upon an accurate reading of the Fourth Amendment, and cannot provide a basis for suppressing evidence in this case.

D.

CONCLUSION

It appears consistent with both the purpose and scope of the Fourth Amendment to hold that one's unprovoked flight from the presence of police provides the justification for a second-tier encounter under the Supreme Court decisions in Terry v Ohio, supra and Florida v Royer, supra. Cf, Michigan v Chesternut, supra, (Kennedy, J., concurring). However, at the very least, the same law that permits a citizen to run from a proffered police encounter permits police to tag along behind him, if only to satisfy their own curiosity. While even one with nothing to hide may feel uncomfortable at the official attention, the Constitution does not guarantee that law enforcement will be faceless, nor that police may not venture out on the streets, for fear of upsetting those with fragile nerves.

Amicus submits that the mere presence of police is a reassurance to those for whom the Law is a protector, rather than an adversary; the only one to whom such a presence is a threat is one with guilty conscience -- and an objective manifestation of that guilty conscience provides police with sufficient grounds to investigate. The contrary rule, requiring police to turn the other way and pretend they saw nothing, not only forces them to ignore the evidence of their senses, but also to suppress the protective instincts that a good policeman needs to execute his duty. Such an outcome is inconsistent with the function of the police in a democratic society, in that forbidding a policeman from discovering what is going on within the range of his own senses severs the Law from its own eyes and ears. More importantly, by demonstrating the Law's inability or unwillingness to keep attuned to the nuances of daily life, it

subverts the very purpose of the Law for the sake of rhetoric, disheartening those who look to the Law for protection, encouraging those for whom the Law is an enemy.

Our courts have recognized the need to recover the confidence and respect of the public, and to avoid "subject[ing] an already much maligned system to further ridicule." People v Moore, 432 Mich 311, 325-326; ___ NW2d ___ (1989). The need to correct the holding of the lower court should therefore be apparent, for such a decision not only conflicts with common perceptions and experience, but is also dangerous to public safety, positively destructive of public order, and likely to make public even more despairing of the ability of democratic institutions to make democracy work -- a system of governance which requires, as a precondition, a Government able to

enforce a rule of law, impose some measure of civility on life, and assure the safety and security needed for freedom to flourish, and law-abiding citizens to prosper. US Const, Preamble; 1963 Const, Art I, sec 1. Cf, Leviathan, supra; The Social Contract, supra.

No Legislative enactment has ever sought to limit the power of police to chase after people who bolt from their presence, and as the Constitution grants courts no legislative power, US Const, Art III, 1-2, judges may not adopt such a rule as a matter of policy. But regardless of any justification for the police conduct at issue, voluntary abandonment deprives a defendant of standing to challenge seizure of item abandoned -- and one who so panics at the sight of police that he discards contraband does so not due to any police conduct, but through the spontaneous

manifestation of his own guilty conscience. Thus, one who runs at the sight of police may not fault them for deciding to tag along, nor challenge the seizure of property he abandons along the way.

Accordingly, the lower court decision in this case is in error, and this Court should reverse.

RELIEF

WHEREFORE, this Court should reverse the holding of the California Court of Appeals.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

HODARI D.,
Respondent.

On Writ of Certiorari to the California Court of Appeal for the First Appellate District

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does flight by itself justify a *Terry* stop?

2. Has a person who flees from police been "seized" before the police acquire physical control?

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I

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

HODARI D.,
Respondent.

On Writ of Certiorari to the California Court of Appeal for the First Appellate District

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. CJLF has received written consent of the parties to file this brief.

An overly complicated law of the Fourth Amendment can act as a great impediment to the police's ability to do their jobs, particularly in combating drugs. "Bright line" rules (1) allowing flight to justify a stop and frisk under *Terry* v. *Ohio*, 392 U. S. 1 (1968) and (2) requiring actual restraint before a "seizure" has been deemed to have occurred will simplify the duties of police officers and trial judges while retaining individual rights. This will aid the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

At 10:00 p.m. on April 19, 1988, two Oakland police officers, Brian McColgin and Jerry Pertoso, were driving on patrol near Foothill Boulevard and 64th Avenue when they saw four youths standing near a red car parked by the curb. Petition for Certiorari ("Pet.") at 7. The youths saw the officers and ran away. The red car also drove off. *Ibid.* The officers decided to pursue because they thought some illegal drug activity had occurred. *Id.*, at 8.

When the officers got to where the youths fled from, Officer Pertoso left the patrol car and ran north to Foothill and then west on Foothill. *Ibid.* Respondent Hodari was then running east on Foothill. *Ibid.* When Hodari noticed he was running towards Officer Pertoso, he tossed a rock to the street. *Id.*, at 8-9. The rock was rock cocaine. *Id.*, at 9. Officer Pertoso then stopped Hodari, handcuffed him, and forced him to the ground. *Ibid.*

Hodari was charged as a juvenile with possession of cocaine. *Id.*, at 5. His suppression motion was denied by the trial court and the allegations against him were found to be true. *Id.*, at 5-6. The California Court of Appeal reversed, finding that the suppression motion should have been granted. *In re Hodari D.*, 265 Cal. Rptr. 79, 86 (Cal. App. 1989).

SUMMARY OF ARGUMENT

Flight by itself should be considered "reasonable suspicion" to justify a stop and frisk under *Terry* v. *Ohio*, 392 U. S. 1 (1968). Such a *per se* rule would advance *Terry*'s purpose of allowing officers to do their jobs effectively while limiting their discretion to intrude upon the privacy of individuals.

The use of the exclusionary rule as the primary means of enforcing the Fourth Amendment creates a need for bright line rules. As the exclusionary rule enforces the Fourth Amendment through deterring illegal police conduct, the exclusionary rule will not work unless police can understand and judges apply consistently the requirements of the Fourth Amendment. Bright line rules will simplify the duties of police officers and judges while retaining individual rights. Requiring (1) actual restraint for seizure to occur under the Fourth Amendment, and (2) allowing flight to justify a *Terry* stop and frisk, are two helpful bright line rules that this Court can enunciate in the present case.

ARGUMENT

I. Defendant's flight justified a stop under *Terry* v. *Ohio*.

A. The Terry Standard.

When this Court applied the exclusionary rule to the states in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the power of the Fourth Amendment was dramatically increased, influencing virtually every criminal prosecution in this country. The rise of the Fourth Amendment, however, put its jurisprudence under increasing strain. An amendment that arose from the abuses of English customs officials, see 1 W. LaFave, *Search and Seizure* § 1.1(a), at 4 (2d ed. 1987), now had to deal with the core functions of modern American police work. These difficulties were compounded by the text of the Fourth Amend-

ment.[2] The text "has 'both the virtue of brevity and the vice of ambiguity' " and is thus difficult to interpret. *Id.*, at 5. The many problems of dealing with the Fourth Amendment in modern society eventually found their way to the chief interpreter of the Fourth Amendment, this Court.

Terry v. *Ohio*, 392 U. S. 1 (1968) helped fit the Fourth Amendment to modern times. *Terry* involved one of the most common and important parts of police work, a "confrontation on the street between the citizen and the policeman investigating suspicious circumstances." *Id.*, at 4. Cleveland Police Detective Martin McFadden, a veteran of 39 years police work, observed Terry and two other people engaging in what appeared to McFadden to be " 'casing a job, a stick-up.' " Believing this was a time for action, Officer McFadden approached the men, identified himself as a police officer, and asked them for their names. After receiving an inaudible response, Officer McFadden grabbed Terry, spun him around, and patted him down. He eventually found a pistol on Terry's person. *Id.*, at 5-7.

The *Terry* Court found that Officer McFadden's acts did not violate the Fourth Amendment. While defendant had Fourth Amendment interests in his stop and search, *id.*, at 9, the *Terry* Court understood that police had a great stake in protecting the legality of the "stop and frisk." *Id.*, at 10. The interests of the public in successful law enforcement, when combined with the relatively less intrusive nature of a stop and frisk, convinced the *Terry* Court to accept the legitimacy of the stop and frisk.

The proponents of the stop and frisk "argued that in dealing with the rapidly unfolding and often dangerous situations

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2. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

on city streets the police are in need of an escalated set of flexible responses, graduated in relation to the amount of information they possess." *Id.*, at 10. According to its proponents, there is a difference between a "stop" and a "seizure" and a "frisk" and a "search." These differences would allow an officer to make the less intrusive stop and frisk with less than probable cause. *Ibid.* The opponents of the stop and frisk would apply one standard to all police activities. "The heart of the Fourth Amendment, the argument runs, . . . is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the state the commands of the Constitution." *Id.*, at 11. They urged that any loosening of the standards governing police conduct "would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers . . . . " *Id.*, at 12.

The *Terry* Court approached this case "mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." *Ibid.* It also recognized that the thrust of the exclusionary rule is deterring unlawful conduct by the police. *Ibid.* Because there would be times when the exclusion of evidence would not deter police conduct, courts had to be cognizant of when their sanctions against the police would be futile. *Id.*, at 14. Given the great diversity of street encounters between police and citizens, see *id.*, at 13, "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Id.*, at 15.

The practical bent of the *Terry* Court extended to its analysis of the particular facts in the case. It recognized that it would be impractical to hold the stop and frisk to the requirements of the Warrant Clause, as it involved "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant proce-

dure." *Id.*, at 20. Instead, the Court simply looked to the reasonableness of Officer McFadden's actions. Using the test found in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), it balanced the need for the stop and frisk against the invasion of privacy entailed by these acts. *Terry*, *supra*, 392 U. S., at 21.

The assessment of the government interests shows the central theme of this opinion. The most important justification for Officer McFadden's decision to approach defendant and his companions was that this decision was part of the core of police work, "effective crime prevention and detection." *Id.*, at 22. If Officer McFadden is to do his job properly, he must be allowed to stop and investigate individuals who act in a manner such as defendant. "It would have been poor police work indeed for an officer of 30 years experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." *Id.*, at 23. The need to let police do their jobs is also reflected in the *Terry* Court's recognition of the police officer's need to make sudden decisions. See *id.*, at 20. *Terry* recognizes that the exclusionary rule "cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections." *Id.*, at 13. Finally, the *Terry* Court justified the frisk of defendant for practical reasons. The Court recognized that police work can be dangerous and there are many times when an officer must be allowed to pat down a suspect so that he may do his job safely. See *id.*, at 23-24.

The *Terry* Court did not leave police officers with unfettered discretion. To justify "the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant intrusion." *Id.*, at 21. Given the balance of government and citizen interests, these facts and inferences did not have to constitute probable cause, but only had to allow an officer "reasonably to conclude in light of his experience that criminal activity is afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . . " *Id.*, at 30. Thus a balance is struck between two

absolutes. The *Terry* Court avoids treating street encounters like searches of dwellings. To do so would stifle police activity on the streets. At the same time, the decision does not give police unfettered discretion to stop people on the streets. By requiring the officer to have specific justification for the stop and frisk, the *Terry* Court brings these encounters into the mainstream of Fourth Amendment law, see *id.*, at 21 n. 18, while recognizing the many practical difficulties encountered by police operating on the streets.

B. Terry's Progeny.

While this Court has never determined whether flight alone can justify a *Terry* stop, the subsequent interpretations of *Terry* show a pattern of deference to limited police intrusions. So long as the justification given for the intrusion acts to limit police discretion, this Court has deferred to the needs of police to respond to imminent criminal activity without the fear of judicial second-guessing.

The closest case this Court has had to the present one was a companion case to *Terry*, *Sibron* v. *New York*, 392 U. S. 40 (1968).[3] In *Sibron*, an off duty police officer surprised two men who were acting furtively in his apartment building's hallway. *Id.*, at 48. Upon seeing them flee, he pursued. He caught, arrested, and searched one of the suspects. *Id.*, at 48-49.

The search was upheld as incident to a lawful arrest. *Id.*, at 66. Defendant's flight was a major factor in the probable cause determination. *Id.*, at 66-67. While the *Sibron* Court relied on several factors in addition to flight to justify the arrest, this does not mean that flight alone cannot justify a *Terry* stop. The *Sibron* Court used these factors to find probable cause to make an arrest. *Id.*, at 66. A *Terry* stop is less intrusive than an arrest, however, see *Terry*, *supra*, 392 U. S., at 20,

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3. This portion of the *Sibron* opinion deals with a joined case, *Peters* v. *New York*.

and thus requires a lower level of proof than probable cause. See *id.*, at 30. Given the different requirements for an arrest and *Terry* stop, it would not be inconsistent with *Sibron* to allow flight to justify a *Terry* stop. While flight was one of the several factors that combined to give overwhelming probable cause to arrest, it was clearly among the most important factors, being one of the two "strong indicia of mens rea" cited by the *Sibron* Court, *id.*, at 66, demonstrating the importance of this type of evidence.

Since *Terry*, this Court has steadily supported the authority of police officers to conduct various stops and frisks without the threat of undue judicial interference. One notable example is found in *United States* v. *Cortez*, 449 U. S. 411 (1981). *Cortez* involved an investigative stop of a vehicle made after Border Patrol officers deduced, by observing various footprints at a border crossing, that groups of illegal aliens were being led across the border on foot and then transported further via vehicle. The officers used this deduction and their knowledge that certain types of vehicles are used to carry illegal aliens to stop defendant's vehicle. After conducting an immigration check, agents found six illegal aliens hiding in defendant's camper. *Id.*, at 413-416.

The *Cortez* Court recognized that under *Terry* and other cases, this investigatory stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Id.*, at 417. There were two criteria for making this decision. "First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers." *Id.*, at 418. These data then allow officers to make inferences or deductions that an average person might be incapable of reaching. *Ibid.* "The second element . . . is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Ibid.*

These two requirements did not, however, straitjacket the police. Behind the *Cortez* decision was the realization that this "process does not deal with hard certainties, but with probabilities." *Ibid.* The officers' privilege to draw conclusions from a certain set of circumstances simply reflects what had long been common practice. "Long before the law of probabilities was articulated as such practical people formulated certain common sense conclusions about human behavior; jurors as fact-finders are permitted to do the same — and so are law enforcement officers." *Ibid.* Thus, the evidence collected and conclusions drawn "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Ibid.*

When viewed from this perspective, the action of the Border Patrol became readily acceptable. The *Cortez* Court reviewed each of the Border Patrol's observations and deductions and found the whole logical chain flawless. *Id.*, at 419-421. "We see here the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement." *Id.*, at 419.

The need for police to be able to do their jobs is recognized in other post-*Terry* cases. In *Adams* v. *Williams*, 407 U. S. 143 (1972), Police Sergeant John Connally was driving alone on patrol duty when a person known to the sergeant approached the car and told him that a person seated in a nearby car was carrying narcotics and had a gun at his waist. *Id.*, at 144-145. After calling for assistance, Sergeant Connally approached the vehicle and asked the occupant to leave the car. When the occupant rolled down the window, Sergeant Connally reached into the car to where he thought a gun would be, and took a loaded revolver from defendant's waistband. *Id.*, at 145. In upholding this stop and frisk, the *Adams* Court emphasized the need to allow police to do their jobs.

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry recognizes that it may be*

the essence of good police work to adopt an intermediate response." *Id.*, at 145 (emphasis added).

Part of an officer's job is ensuring his own safety while conducting his duties. Thus an officer making a *Terry* stop "should not be denied the opportunity to protect himself from attack by a hostile suspect." *Id.*, at 146. As long as an officer is justified in making a forcible stop, he may also pat down the suspect for weapons. *Ibid.* Therefore, as Sergeant Connally properly responded to an informant's tip, he could search defendant for the weapon he suspected defendant of possessing. *Id.*, at 147-148.

Terry's basis in common sense has allowed this Court to apply it to situations beyond those which first brought about the ruling. *Terry* initially dealt with street encounters where a police officer believed a crime was about to take place. *Terry*, *supra*, 362 U. S., at 30. Since then, *Terry* has been applied to Border Patrol checkpoints (*United States* v. *Martinez-Fuerte*, 428 U. S. 543, 567 (1976)); automobile stops (*Cortez*, *supra*, 449 U. S., at 417); and "sniff tests" of airport luggage (*United States* v. *Place*, 462 U. S. 696, 697-698 (1983)). *Terry* has been expanded to include investigation of crimes that have already been completed. *United States* v. *Hensley*, 469 U. S. 221, 229 (1985). The post-*Terry* decisions have also recognized that *Terry* is not just a method for allowing a law enforcement officer to protect himself. A general interest in law enforcement can be enough to justify a *Terry* stop. See *Place*, *supra*, 462 U. S., at 703-704. The many different uses of *Terry* reiterates the practical essence of this decision.

Terry does not, however, present police officials with a blank check. An officer can only stop a person after developing an articulable suspicion supported by more than rumor that the person may be involved in some suspicious activity. See *Terry*, *supra*, 392 U. S., at 21. This is intended to prevent an officer from making *Terry* stops with unfettered discretion.

Time and again the cases in which this Court has invalidated *Terry* stops turned on whether an officer's justification for the stop sufficiently limited his discretion. Thus, in *Brown* v. *Texas*, 443 U. S. 47 (1979), this Court castigated the police for making a stop for the sole reason that the suspect looked suspicious.[4] *Id.*, at 49. The primary reason behind the reversal was to limit the discretion of police officers. "A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions *solely at the unfettered discretion of the officers in the field.*" *Id.*, at 51 (emphasis added).

Another example of conduct exceeding the limits of *Terry* is found in *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975). Here, Border Patrol agents operating a roving patrol for illegal immigrants stopped a car near the Mexican border with no justification other than the vehicle's occupants appeared to be of Mexican descent. *Id.*, at 875. The Court rejected this as the sole justification for a *Terry* stop, recognizing that it placed too much discretion in the hands of Border Patrol officials.

> "In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government . . . . To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interferences with their use of the highways, *solely at the discretion of Border Patrol Officers.*" *Id.*, at 882 (emphasis added).

Terry was decided with the recognition that the police encounter many difficult situations when working in the field. The needs of the police and the rights of individuals are balanced by allowing relatively unintrusive stops and frisks so long as some legitimate law enforcement goal justifies the intrusion. The only requirement is that the officer have some reasonable

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4. The officer then frisked defendant because he refused to identify himself and was in a "high drug problem area." *Id.*, at 49.

suspicion that the suspect is engaged in some suspicious activity. *Terry* is a practical case and it should be used in a practical manner. So long as the officer's discretion is sufficiently limited and the purpose of his actions are properly related to legitimate law enforcement goals, courts should not second-guess decisions made by officers in the field.

C. Terry and Flight.

A court reviewing a *Terry* stop and frisk examines it under the general reasonableness requirement of the Fourth Amendment. *Terry*, *supra*, 392 U. S., at 20. The reasonableness of the stop and frisk is determined by balancing the need for the search with the scope of the invasion. *Id.*, at 20-21. The Court of Appeal contradicted the purpose of *Terry* when weighing the costs and benefits of Officer Pertoso's decision to pursue and detain respondent.[5] The court, citing California Supreme Court precedent, determined that flight alone cannot justify a *Terry* stop. *In re Hodari D.*, 265 Cal. Rptr. 79, 84 (Cal. App. 1989) (citing *People* v. *Aldridge*, 35 Cal. 3d 473, 478, 674 P. 2d 240, 242-243 (1984)).

Other than stating that flight is insufficient justification and that there was no other justification for the stop, the court below engaged in only cursory analysis of the propriety of the stop. The court cited *Wong Sun* v. *United States*, 371 U. S. 471 (1963) to support its holding that flight does not justify a *Terry* stop. *Hodari D.*, *supra*, 265 Cal. Rptr., at 84. *Wong Sun* is distinguishable, however, because it dealt with a probable cause determination. *Wong Sun*, *supra*, 371 U. S., at 479. By simply dismissing flight as a justification for a *Terry* stop, the court below avoids the balancing approach that has been taken by this Court in *Terry* and its progeny, and thereby avoids recognizing the great burden the court's decision places on the police officer in the field.

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5. Amicus agrees with California's position that respondent was not seized until physically stopped by Officer Pertoso. See part II. B. 1., *infra*, at 21-25.

An officer's decision to initiate a *Terry* stop "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." See *Graham* v. *Conner*, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 413, 455 (1989) (use of force at *Terry* stop). The officers in the present case drove towards a group of young men huddled together who fled as the officers' car approached. Pet. at 7. The officers were then presented with two choices: pursue or allow them to flee. In deciding to pursue, the officers made a logical decision consistent with police practices that served a crucial government interest.

When a group of people flee at a person's approach, that person's suspicions naturally will be aroused. The suspicion will be all the greater when the person fled from is a police officer. Flight has long been recognized as evidence of a guilty mind. See *Sibron* v. *New York*, 392 U. S. 40, 66 (1968); 2 J. Wigmore, *Evidence* § 276, at 122 (Chadbourne rev. 1979).[6] Thus an officer will pursue a fleeing individual to see what he has done to make him want to flee. This is what happened in the present case. Pet. at 8.

Pursuing a fleeing person makes even more sense when the police officer's role is taken into account. A primary function of the police officer is investigation. See *Miranda* v. *Arizona*, 384 U. S. 436, 477 (1966) The investigative powers of the police can be aimed at past, future, or current criminal conduct. See *United States* v. *Hensley*, 469 U. S. 221, 227-228 (1985). As flight is indicative of a guilty mind, it would be bad police practice to not investigate why the youths fled. Cf. *Terry*, *supra*, 392 U. S., at 23. *Terry* was never intended to punish officers for good, aggressive investigation. See *United States* v. *Cortez*, 449 U. S. 411, 419 (1981).

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6. It is unclear whether respondent knew that the car that drove towards the youths contained police officers. See *Hodari D.*, *supra*, 265 Cal. Rptr., at 81. Even flight from strangers, absent any innocent explanation, is an indication of a guilty mind. *Sibron*, *supra*, 392 U. S., at 66.

Balanced against the interest of police officers in doing good work is defendant's interest in not being pursued and stopped. A person who has done nothing to arouse suspicion towards himself has a right not to have contact with or be questioned by the police. Therefore, if respondent wanted to avoid contact with the police and the police had no articulable suspicion of criminal conduct on his part, then the police must let him go. This was the basis of the Court of Appeal's decision to invalidate the *Terry* stop. It felt that allowing flight to justify a *Terry* stop would eliminate a person's right to avoid contact with police. Any attempt by a citizen to exercise his right to terminate an encounter with an officer, the argument goes, would automatically subject the citizen to a *Terry* stop. *Hodari D.*, *supra*, 265 Cal. Rptr., at 84.

The problem with this decision is that it fails to take into account that there are many different ways of ending an encounter with police. A simple straightforward denial of a police request will not provide the officer with cause for a *Terry* stop. Thus a simple refusal to identify oneself cannot justify a frisk. See *Brown* v. *Texas*, 443 U. S. 47, 49, 53 (1979). Similarly, a person is entitled to walk away from a police officer when asked to stop and respond to questioning. See *Smith* v. *United States*, 558 A. 2d 312, 317 (D. C. App. 1989) (walking at "fast pace" but not "bolting" or "running" does not justify stop).

Respondent's actions, however, were not innocent. He did not simply assert his right to avoid contact, he and his compatriots ran as they saw the officers' car approach. Pet. at 8. This indicated to the police that respondent had a guilty mind, *ibid.*, and demonstrated that he may have known that the unmarked car was a police car. Both items are worthy of investigation and both were given to the officers by respondent. Had respondent simply walked away, see *Smith*, *supra*, or had he simply held his ground and refused to answer any questions posed to him by the officers, see *Brown*, *supra*, there would have been no grounds for a *Terry* stop.

As it was respondent's own decision to flee that imparted this information to the officers, he should not be allowed to use any right to avoid contact to negate the officers' reasonable suspicion. The Court of Appeal's reasoning, if upheld, would make it impossible for an officer to pursue someone who flees from his presence. "The fact of flight itself is significant; it becomes most significant when after all no explanation is forthcoming." 2 Wigmore, *supra*, § 276 at 129. These questions deserve answering. The need to answer these questions provide more than the reasonable suspicion necessary to justify a *Terry* stop.

The reasonable suspicion requirement was affixed to *Terry* to limit police discretion.[7] Flight provides exactly the type of objective basis for suspicion that properly limits the discretion of the officer in the field. Flight is both self-evident and articulable. It does not conjure up some vague and subjective standard. Cf. *Brown* v. *Texas*, *supra*, 443 U. S., at 49 (suspect "looked suspicious"). It does not threaten arbitrary application, such as an officer's decision to pull a motorist over because he had nothing better to do. Cf. *Delaware* v. *Prouse*, 440 U. S. 648, 650-651 (1979). Flight is not indiscriminately applicable to a large number of innocent people. Cf. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 885-886 (1975) (Mexican ancestry).

When someone flees when a police officer approaches, it is reasonable for an officer to want to pursue and stop him. The officer only has a few seconds to decide whether to pursue him. If the officer decides to let him flee, then in all likelihood the officer will never be able to determine why the person fled.

In the heat of the moment, Officers McColgin and Pertoso decided to find out what respondent was up to. In so doing, the officers did their jobs well. They were able to stop defendant, and they determined that he was engaging in criminal acts without arbitrarily infringing upon any of his rights. Good police work such as this deserves commendation, not condemnation.

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7. See part I. B., *supra*, at 10-12.

II. More bright lines need to be established regarding the propriety of searches and seizures under the Fourth Amendment.

A. The Need for Bright Lines.

The Fourth Amendment presents a dilemma for the legal system. Every arrest, search, and seizure of evidence made by any government official in this country must satisfy the requirements of the Fourth Amendment. Furthermore, matters wholly unrelated to searches and seizures, such as confessions, can be invalidated if they are sufficiently tainted by an improper search or seizure. See *Wong Sun* v. *United States*, 371 U. S. 471, 485 (1963). The difficulty with the Fourth Amendment, however, is that its text is very vague and therefore very difficult to interpret. See 1 W. LaFave, *Search and Seizure* § 1.1(a), at 5 (2d ed. 1987).

The problem of broad application but difficult interpretation is compounded by the method used to enforce the Fourth Amendment. The primary tool for enforcing the proscriptions of the Fourth Amendment is the exclusionary rule. See *id.*, at 7. The exclusionary rule is designed to enforce the Fourth Amendment by deterring police from violating it. See *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). This compounds the difficulties behind the Fourth Amendment by placing the burden of interpreting the Fourth Amendment on police officers, people who are not always trained enough to be able to interpret every ambiguity of search and seizure law. Therefore, courts must provide some bright lines to allow police to be able to do their jobs properly while staying within the bounds of the Fourth Amendment.

If an officer cannot understand a particular rule, then the exclusionary rule is incapable of deterring him from violating it. It is no insult to police officers to say that the complexities of the Fourth Amendment can make it difficult for police to abide by it. The rules that govern the police under the Fourth Amendment come from decisions written by judges for lawyers. Under our common law system, these decisions are subject to constant modification by the courts to fit each new situ-

ation. The end result can be a web of precedents designed for and only usable by attorneys. The law of search and seizure is so complicated that the major treatise on the matter is over 2,500 pages long, see LaFave, *supra*.[8] It is easy to understand why the complexity of Fourth Amendment law is a major stumbling block behind its successful enforcement through the exclusionary rule. See Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 Tex. L. Rev. 736, 740-741 (1972); Oakes, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 731 (1970).

Another problem with Fourth Amendment law is inconsistent application by the courts. A problem with some Fourth Amendment decisions of this Court is that different courts will reach different results on the legality of factually similar searches. See Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. Crim. L. & Criminology 437, 458-459 (1988). Fourth Amendment claims are not subject to the same degree of review as other federal constitutional claims, see *Stone* v. *Powell*, 428 U. S. 465 (1976), so it is important that trial courts have clear guidelines for producing consistent results. Furthermore, a seemingly arbitrary application of the exclusionary rule by lower courts will add to the public's alienation when the guilty go free because of an officer's error. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 412 (1971) (Burger, C. J., dissenting).

One way to alleviate these problems is by providing the courts and police with well-defined standards. These "bright lines" will make it much easier for the police and courts to understand what conduct is expected under the Fourth Amendment, thereby preventing post-hoc judicial second-guessing of police.

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8. In comparison it took Professor LaFave only around 1200 pages to explain all of the substantive criminal law, see W. LaFave & A. Scott, *Substantive Criminal Law* (1986).

This Court has recognized the need for some bright lines in previous Fourth Amendment cases. In *New York* v. *Belton*, 453 U. S. 454 (1981), this Court was confronted with the issue of what was the permissible scope of a search of an automobile incident to a lawful arrest. *Id.*, at 455. In *Belton*, a New York State policeman pulled a vehicle over for excessive speeding and was able to determine that none of the four occupants owned the car and that marijuana was present inside the car. *Id.*, at 455-456. He ordered the occupants out, and after finding an envelope containing marijuana in the car, placed them under arrest. After separating the four men and reading them their *Miranda* warnings, the police officer searched the passenger compartment of the car. On the back seat of the car he found a jacket that belonged to defendant Belton, unzipped one of the jacket pockets, and found cocaine. The New York Court of Appeals reversed Belton's conviction, holding that the officer had no right to search Belton's jacket as there was no danger that Belton or a confederate could gain access to the jacket. *Id.*, at 456.

This Court reversed. It based its decision on the need to simplify the law of searches incident to a lawful custodial arrest. Since *Chimel* v. *California*, 395 U. S. 752 (1969), this Court had recognized that a lawful custodial arrest creates a situation where the requirements of the Warrant Clause had to be partially suspended. An officer was entitled to make a contemporaneous warrantless search of the person arrested and the immediately surrounding area " 'to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' . . . ." *Belton*, *supra*, 453 U. S., at 457 (quoting *Chimel*, *supra*, 395 U. S., at 763).

The problem with the *Chimel* standard was that while "the principle that limits the search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases." *Belton*, *supra*, 453 U. S., at 458. Yet the goals of the Fourth Amendment could "only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Ibid.*

quoting LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. Rev. 127, 142.

The *Belton* Court understood that the Fourth Amendment had to deal with the day-to-day activities of the police. *Ibid.* Therefore " '[a] highly sophisticated set of rules qualified by all sorts of ifs, ands, and buts' " while entertaining to lawyers and judges, was not the type of standard that could be applied to officers in the field. *Ibid.* "In short, '[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.' " *Ibid.* quoting *Dunaway* v. *New York*, 442 U. S. 200, 213-214 (1979). Everybody was harmed by vague standards. "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Id.*, at 459-460. Thus a bright line separating permissible from impermissible conduct had to be drawn.

Belton held that whenever an officer makes a lawful custodial arrest of the occupant of an automobile, the officer is entitled to search the passenger compartment of the vehicle. *Id.*, at 460. This holding retreats somewhat from the principles announced in *Chimel*. There will be times when the containers searched under the rule announced in *Belton* could not possibly carry a weapon nor evidence relating to the conduct for which the suspect was arrested. *Id.*, at 461. Nonetheless, the *Belton* Court adhered to the bright line rule. It recognized that in order to have a workable rule it had to generalize the prescriptions of *Chimel* to a broader, more easily defined rule.

Another example of this Court's desire to avoid overly complicated rules is found in another search incident to a lawful arrest case, *United States* v. *Robinson*, 414 U. S. 218 (1974). Defendant was arrested for driving without a license. The court of appeals in *Robinson* limited the authority of the arresting officer to a pat down for weapons and a search for any evidence of the crime for which the suspect was arrested.

Id., at 227. As there could be no further evidence to be obtained from Robinson relating to the charge of driving without a license, the court of appeals held that the arresting officer only had authority to conduct a frisk for weapons. *Ibid.*

The *Robinson* Court rejected this rule. A key reason behind this decision was the need to simplify the law of search and seizure.

> "But quite apart from these distinctions, our more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. . . . A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." *Id.*, at 235.

Therefore the *Robinson* Court adopted a much simpler rule, granting officers authority to conduct a full search incident to any lawful arrest. *Ibid.*

This Court has used bright lines in other areas of criminal procedure. An important example of this work exists in the law of confessions. *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966) adopted a rule declaring all custodial confessions to be inherently coercive unless certain safeguards of the suspects rights were followed. The rule in *Miranda* would not allow a court to use the facts of a particular case beyond determining whether the guidelines were followed. *Id.*, at 468-469. Instead, the *Miranda* Court supplied a set of concrete guidelines for courts and police to follow. *Id.*, at 441-442.

Another example of a bright line rule is found in *Edwards* v. *Arizona*, 451 U. S. 477, 484-485 (1981), where this Court held that once a suspect undergoing custodial interrogation asks for counsel, interrogation must cease until the suspect's counsel

arrives or the suspect unilaterally decides to revive his interrogation. This Court has "repeatedly emphasized the virtues of following a bright line rule in cases following *Edwards* as well as *Miranda*." *Arizona* v. *Roberson*, 486 U. S. 675, 681 (1988). The need for bright lines was reiterated in *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979):

> "Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible."

These reasons apply with equal strength to the Fourth Amendment. For the exclusionary rule to succeed, the law of the Fourth Amendment "must be clear, unambiguous, not susceptible to quibbles or easy avoidance, and easily understandable by the persons sought to be deterred." Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L. J. 329, 333 (1973). So long as the exclusionary rule is the principal means of enforcing the Fourth Amendment, this Court will need to develop bright line rules to allow the police and courts to understand and apply the requirements of the Fourth Amendment.

B. Two Bright Lines can be Applied to the Present Case.

1. Restraint and seizure.

One area of Fourth Amendment law in which a bright line would be useful is in defining the term "seizure." Traditionally, seizure is defined as "[t]o grasp suddenly and forcibly; take or grab." *The American Heritage Dictionary*, 1111 (2d College ed. 1987). In defining what constitutes a seizure of a person under the Fourth Amendment, this Court has moved away from this view towards a subjective definition of when a person is seized. By focusing on when a person thinks he is seized, the decisions of this Court have added an unnecessary layer of

uncertainty to the Fourth Amendment. A return to the traditional meaning of seizure will eliminate uncertainty while retaining the balance between police powers and individual rights under the Fourth Amendment.

In *United States* v. *Mendenhall*, 446 U. S. 544 (1980), this Court took up the issue of what constituted a seizure of a person under the Fourth Amendment. In *Mendenhall*, DEA agents identified defendant as a possible drug courier as she disembarked from a commercial flight at Detroit Metropolitan Airport. *Id.*, at 547. As she walked through the concourse, the agents approached her, identified themselves, and asked to see her identification and airline ticket. *Id.*, at 547-548. They questioned her and one agent asked her to accompany him to the DEA office for further questions. She did so and consented to a search of her handbag and her person inside the office. *Ibid.* Heroin was found on her person. *Id.*, at 549.

Two members of the majority, Justices Stewart and Rehnquist, found no seizure when defendant was questioned in the concourse. *Id.*, at 555. They determined that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *Id.*, at 553. Therefore, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*, at 554.[9] This test was adopted by a majority of this Court in *INS* v. *Delgado*, 466 U. S. 210, 215 (1984). *Delgado*, like *Mendenhall*, involved "an initially consensual encounter," *ibid.*, and not a fleeing suspect.

The most recent application of this standard is found in *Michigan* v. *Chesternut*, 486 U. S. 567 (1988). The question in

9. Three other justices chose not to reach the question of whether a seizure occurred but instead found that the federal agents had a reasonable suspicion to stop defendant for questioning. *Id.*, at 560 (Powell, J., concurring).

Chesternut was whether officers "seized" defendant when they drove alongside him in a marked patrol car while he was running from them. *Id.*, at 569. The Court found that no seizure had taken place. The majority rejected Michigan's and defendant's request to formulate bright line rules to govern investigatory pursuits. *Id.*, at 572. Instead, the *Chesternut* Court decided to "adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure." *Id.*, at 573.

The majority recognized that the *Mendenhall* test was "necessarily imprecise" as it focused on the entirety of police action rather than focusing on a few isolated details. *Id.*, at 573. Furthermore, the Court understood that the concept of "what constitutes a restraint on liberty prompting a person to conclude that he is not free to leave will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Ibid.* Nonetheless, the majority felt the *Mendenhall* standard retained sufficient objectivity by "looking to the reasonable man's interpretation of the conduct in question . . . ." *Id.*, at 574.

Applying the *Mendenhall* standard to the facts of the case, the *Chesternut* Court concluded that defendant was not seized before he discarded the packets. *Ibid.* The act of chasing defendant did not necessarily mean that detention was imminent. *Id.*, at 574-575. Here "[t]he record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course . . . . " *Id.*, at 575. As the officers did no more than accelerate and drive parallel to defendant, they did not so intimidate defendant as to make him believe that he was not free to go about his own business. *Ibid.* Because of the flexibility of the *Mendenhall* test, the *Chesternut* Court did not have to articulate any rule that went beyond the particular facts present in *Chesternut*. Therefore, the Court concluded "only that in this particular case, the police conduct in question did not amount to a seizure." *Id.*, at 573.

Justice Kennedy, in a concurrence joined by Justice Scalia, provides a more practical alternative. While the concurrence pays heed to the reasonable belief rule of *Mendenhall* and *Delgado*, see *id.*, at 577 (Kennedy, J., concurring), it advances the idea "whether or not the officers conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections *until it achieves a restraining effect.*" *Id.*, at 577 (emphasis added). This idea was expanded in *Brower* v. *County of Inyo*, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). In *Brower*, an action under 42 U. S. C. § 1983, the Court stated that no seizure in violation of the Fourth Amendment could occur unless there was "an intentional acquisition of physical control" by the police. *Id.*, at 1381, 103 L. Ed. 2d, at 635. This passage of *Brower* strongly implies that when the suspect flees rather than stopping on command, there has been no seizure until the moment of effective physical restraint.

The problems with the subjectivity of the *Mendenhall* rule can be seen in the California Court of Appeal's treatment of the present case. The court below determined that Officer Pertoso's simple act of chasing respondent constituted a seizure. *In re Hodari D.*, 265 Cal. Rptr. 79, 83 (1989). It reaches this conclusion in spite of the similarity between this case and *Chesternut*. The only major difference between *Chesternut* and the present case is that in *Chesternut* the officers drove parallel to the suspect, while in the present case, Officer Pertoso ran toward respondent in an effort to cut him off. *Ibid.* Yet this was enough to turn a chase into a seizure. *Ibid.*

The decision in *Chesternut* does not provide courts with much guidance. The *Chesternut* Court did indicate that an attempt to cut someone off with a car could make it more likely that a seizure occurred. *Chesternut*, *supra*, 486 U. S., at 575. This decision did not, however, state how much weight should be given this factor, nor did it state whether pursuit on foot was as intimidating as being chased by a car. *Ibid.* As the *Chesternut* decision only applied to the facts of that particular case, *id.*, at 573, there was no way to know what would constitute a seizure under *Chesternut*. The lack of guidance that the courts have received from *Mendenhall*, *Delgado*, and *Chesternut* is demonstrated by other courts' inconsistent interpretation of *Mendenhall*. See Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. Crim. L. & Criminology 437, 458-459 (1988).

Applying a bright line rule requiring a fleeing suspect to be actually in the control of an officer for a Fourth Amendment seizure to occur solves the problems presented by the *Mendenhall* standard in the present case. Thus when a suspect flees from an officer and does not heed any commands to stop, he is not seized until the officer asserts physical control over him. See *Brower*, *supra*, 109 S. Ct., at 1381, 103 L. Ed. 2d, at 635. While a different standard may apply when a person stops at the command of an officer, see *Mendenhall*, *supra*, 446 U. S., at 547, the present case does not raise the issue. See Pet. at 8-9. As Hodari was still fleeing from Officer Pertoso when he discarded the rock cocaine, Pet. at 9, the cocaine was not the product of a seizure.

Allowing courts to engage in case-by-case adjudication of what constitutes a seizure will create enormous inconsistencies. "A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States* v. *Sharpe*, 470 U. S. 675, 686-687 (1985). In drug cases, this inconsistency will be particularly damaging. A drug case is usually decided by the suppression motion. Applying a subjective standard to so important an issue can play havoc with the nation's enforcement of drug laws. Replacing the *Mendenhall* test with the bright line of actual control will add needed consistency to the enforcement of our drug laws.

2. Flight and bright lines.

Another area where a bright line rule would be useful is in determining what constitutes sufficient justification for a stop and frisk under *Terry* v. *Ohio*, 392 U. S. 1 (1968). *Terry* deals with a wide variety of encounters between officers and civilians. *Id.*, at 12. Thus no single rule can govern every possible *Terry* encounter. See *Sharpe*, *supra*, 470 U. S., at 685-686.

While every *Terry* situation cannot be covered by one rule, this Court can demonstrate that certain facts, when known to the officer, will always justify a *Terry* stop.

Terry's greatest virtue, its flexibility, can also be its greatest vice. While *Terry* must be flexible enough to deal with many different encounters between officer and citizen, this flexibility can lead to the problems of inconsistent application and incomprehensible standards. These problems can be particularly harmful in *Terry* situations. *Terry* frequently deals with situations in which an officer's life may be in danger. See *Terry*, *supra*, 392 U. S., at 23-24. Furthermore, the decision to make a *Terry* stop often involves "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat . . . ." *Id.* at 20. Therefore, easily understood guidelines would be very helpful to an officer deciding whether to make a *Terry* stop.

The present case demonstrates the need for such a guideline. Flight is strongly indicative of a guilty mind and raises important questions that a good police officer should try to answer.[10] Allowing flight to justify a *Terry* stop also sufficiently limits police discretion to preserve the rights that *Terry* was intended to protect.[11] Therefore, an officer seeing someone flee from his presence can make the split-second decision to pursue without worrying about being second-guessed by the courts.

Terry was designed to advance certain practical goals. It was intended to allow police to react to various encounters with civilians without the burdens of the warrant requirement or probable cause while still limiting the discretion of the officer to interfere with an individual's privacy. Recognizing that certain facts invariably justify a *Terry* stop is a practical solution to the problems associated with *Terry*'s flexibility. Recog-

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10. See part I. C., *supra*, at 13.

11. See part I. C., *supra*, at 15.

nizing that flight justifies a *Terry* stop and frisk would advance the primary goal of *Terry* — allowing police to do their jobs.

CONCLUSION

The decision of the California Court of Appeal for the First Appellate District should be reversed.

Dated: November, 1990

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

HODARI D.,
Respondent.

On Writ of Certiorari To The California Court of Appeal First Appellate District

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. What practical effects will follow if this Court adopts the Californis State Attorney General's position.

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EXHIBIT LIST

(A copy of each exhibit has been lodged with the Clerk of the Court)

EXHIBIT 1	Police Report—David Wilkins arrestee
EXHIBIT 2	Medical Records—David Wilkins
EXHIBIT 3	Testimony of David Wilkins
EXHIBIT 4	"Bad Cops" Transcript of "60 Minutes" program
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EXHIBIT 10	Operation Five (OHA Investigation)
EXHIBIT 11	Operation Two (OHA Investigation)
EXHIBIT 12	San Francisco Chronicle News Article
EXHIBIT 13	Oakland Tribune News Article
EXHIBIT 14	Written Consents To File Amicus Brief

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BRIEF OF AMICUS CURIAE

Amicus Curiae, Marvin Cahn is filing this brief accompanied by the written consent of all parties to the case pursuant to Supreme Court Rule 37. The written of consents are appended hereto as Exhibit 14.

INTEREST OF AMICUS CURIAE

The Law Office of Marvin Cahn is a criminal defense office specializing in criminal defense and Constitutional issues. Our office has filed numerous Amicus briefs in numerous courts both individually and on behalf of national criminal defense organizations such as the National Association of Criminal Defense Lawyers.

Our office filed an Amicus Brief pertaining to the Oakland Housing Authority case, a case which is described in this proposed Amicus brief as being illustrative of the abuses which surround "dropsy cases". Therefore, we are closely involved with

the issues raised in this brief and we believe that knowledge of these issues may be of use to this Court.

The *Hodari D.* cases raises issues affecting civil liberties such as personal privacy, the right to freedom of movement, and the right to express distrust of police officers without fear of detention.

In addition, the outcome of *Hodari D.* will have a long term impact upon the quality of police work, the ability of prosecutors to evaluate the reliability of police reports and the ability of defense attorneys to effectively challenge the factual circumstances underlying a detention and arrest.

We perceive the Petitioner's position as creating a virtual green light to detain based upon essentially innocent responses by citizens to police officers. We fear law enforcement based upon "hunch" or "feelings of fear" and wish to urge the Court to require more substantial and objectively verifiable grounds to justify detention.

In urging this position, we seek to present this Court with material which portrays the practical import of the legal issues before the Court. Using examples drawn from cases arising out of the City of Oakland, California, where *Hodari D.* arose, we propose to demonstrate that adoption of the Petitioner's position would function to condone abuses of civil rights by police officers without any significant benefit to legitimate law enforcement.

Accordingly, we move for leave of this Court to file an *Amicus Curiae* brief herein.

SUMMARY OF ARGUMENT

The *Attorney General's position in Hodari D.* is a trojan horse providing ammunition for crooked police officers while providing little or no real benefit to honest law enforcement.

"Dropsy" narcotics cases are disfavored because legitimate "dropsy" cases are rare but perjured "dropsy" cases are common.

Rock cocaine is a dense substance and most people who run and drop cocaine actually run and toss cocaine. The small size of

the object combined with its weight usually results in the disappearance of the object. It is rare for a person to drop the drugs right by his feet. However, it is common for "dropsy" police reports to make such allegations.

The demonstration of fear towards police officers whether by facial expression, running away or by other means is unnecessary for effective drug enforcement. Drug sales on city streets are done in the open. One need only watch the dealers line the streets like vendors at a baseball game to realize the ease with which law enforcement can apprehend drug sellers. The real limitation is not the "legal technicality" imposed by the California Courts in *Hodari D.*, the real limitation is manpower to make the arrests, file the paperwork and appear in court.

ARGUMENT

A MINORITY OF "BAD COPS" HAVE CONTRIBUTED TO A GENERALIZED FEAR OF POLICE IN THE INNER CITIES; FALSIFIED DROPSY CASES ARE A FAVORED TOOL OF "BAD COPS"

A deep distrust of law enforcement pervades America's cities. The distrust ranges from a belief that the officers "just don't care" to a perception of the police as an occupying (and marauding) army.

There is no societal benefit in promoting "dropsy" cases as the "dropsy" justification is easy to manufacture and hard to disprove.

Dropsy cases are most often the result of police officers approaching citizens, questioning them, detaining them and searching them, all without legal cause. When and if drugs are found, a dropsy report is prepared.

Example 1: David Wilkins

Two police officers in a marked patrol car, enter the driveway of an eight unit housing complex. They observe two young men sitting on a bench and another young man walking away.

One of the officers thinks that the recognizes the young man who is walking away. He runs up behind him, pulls him to the

ground and when he finds the young man resistant to being restrained, he beats him. The police officer's partner approaches and says, "That's the wrong guy", the response is "I don't care and the beating continues.

The officer cuffs the young man and searches him. Finding no drugs, he takes a rock of cocaine out of his own pocket and attributes the drug to the young man.

Still, later, the police report states that this young man ran when the officer approached and as he ran he dropped cocaine on the ground.

Later, the young man is seen at the county hospital and is treated for multiple contusions. He later loses a tooth due to the beating.

In April of 1989, this actually happened to David Wilkins. In December of 1989 the Alameda County District Attorney dismissed the charges in the "interest of justice". In April of 1990, a hearing was held pursuant to California Penal Code Section 851.8.1.[1]

After days of hearing at which the former defendant, the arresting officer, the Chief of Police and others testified, the Superior Court judge found David Wilkins factually innocent. In making that ruling, the Judge stated that he believed David Wilkins and did not believe the arresting officer or the Chief of Police.

The "he ran, he dropped" charge made the case one of David Wilkin's word against the officers. The defense was able to present evidence of prior perjury by the officer and inconsistencies in testimony. Also, David Wilkins had only one criminal conviction (Driving on a suspended license) and had a work history

[1] California Penal Code section 851.8 provides in part "(c) In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court which dismissed the action for a finding that the defendant is factually innocent of the charges . . ."

working as a children's recreation director. In most cases, the defendant would not be able to testify and the police officer would have prevailed.

Meanwhile, David Wilkins lost his job as a children's recreation director due to this arrest. He moved out of Oakland and he is so upset about what happened that he will not return, even to visit.

Example 2

CASE STUDY: THE OAKLAND HOUSING AUTHORITY

Recently, the City of Oakland, California, was rocked by a corruption scandal which touched virtually every member of the 26 man Oakland Housing Authority police force. This scandal uncovered evidence of drug planting and general searches all covered by false police reports which usually contained the "He ran, he dropped" scenario. The results of the investigation (the largest police corruption investigation in Northern California history) led to the indictment of six officers. The investigative findings detail a template of corruption built upon the "He ran, he dropped" false police report. The position urged by the Attorney General would only promote more corruption of the type found in Oakland. Ironically, the Attorney General's office was a major participant in the Oakland Housing Authority investigation.

The Housing Authority

This police force patrols over 3300 units which are owned or supervised by the Oakland Housing Authority. The Housing Authority police force is comprised of officers who have performed prior service for the police forces of other cities and of new recruits. The force is almost entirely funded by grants from H.U.D.

The Scandal

The scandal uncovered large scale drug planting, perjury and theft. The main methods used to justify these crimes were "dropsy" and "runner" police reports. This corrupt department was investigated by the State Attorney General, local law enforcement and the F.B.I. What was uncovered is instructive not just as

to the tactics of one corrupt police force but as a map as to the general practices of corrupt law enforcement in general. (In fact, two Oakland Police officers were arrested during this Housing Authority Investigation).

The Investigation

The Alameda County District Attorney's office, State Attorney General and other police agencies launched an investigation which included nine undercover operations. In each of these nine operations, Housing Authority officers, planted drugs and often also beat or robbed the undercover officers. During each of these undercover operations, the Housing Authority Officers made false dropsy claims (or similar claims) and filed false police reports. Often money was taken and beatings were administered. All of these crimes were recorded on videotape.

In addition, Oakland Police officer Lundquist, whose job was to review all narcotics arrests (whether by the Oakland Housing Police or by the Oakland Police Department) became suspicious when he found that 75% of the Housing Authority arrests were dropsy cases. He noted that real dropsy cases were rare because the drugs were usually thrown where they could not be recovered.

This report should not be considered less meaningful because it involves Housing Authority officers and not Oakland Police officers (as in Hodari D.), we have included the report of Undercover Operation Number 5 where two Oakland Police officers were caught in the Housing Authority net. Their crime, a false police report falsely alleging a "dropsy".

Attached as Exhibits to this Amicus brief are documentation of some of the undercover operations directed at the Oakland Housing Police. We have also enclosed police reports and other material describing egregious but typical "dropsy" and "runner" cases.

The following are quotations from former OHA officers.

> "We brutalized people, we stole their money, we planted drugs on them to take them off the street." (Jeff Garden, Transcript 60 Minutes, page 1, Exhibit 4)

> "When I first started, they . . . they said, if the guy runs, beat him up. If he's you know . . ." (Jeff Garden, Transcript 60 Minutes, page 3, Exhibit 4)

> "We'd be driving, and all of a sudden he would just stop a group of people, and we'd get out, and we'd make contact with them, if they took off running, we'd chase them and catch them and bring them back.
>
> WALLACE: Did you have any reason to believe that they had drugs?
>
> "Well no, we didn't." (Jeff Garden, Transcript 60 Minutes, page 8, Exhibit 4)

> "Sergeant Broussard felt I did not have probable cause to search Mr. Finley's groin. He advised me to manufacture probable cause. He told me to write a report that I saw Mr. Finley throw the narcotics to the ground. I prepared the police report falsely in accordance with Sergeant Broussard's instructions." (Declaration of Khaveo Barryer, Former OHA Officer, Exhibit 5 at page 3)

> "I heard over the radio that Sergeant Broussard 'had a runner' . . . I saw Officer Garden chasing a male black. . . . I gave chase of the suspect on foot and finally apprehended and detained him. At this point Officer Dwyer arrived and cracked the suspect over the head with a weapon . . . Sergeant Broussard then asked, 'now that we have the suspect, what are we going to arrest him for?' I saw Officer Garden go over to an OHA vehicle, raise the trunk, reach inside a brief case, and pull out a small plastic baggie containing a rock of cocaine. . . . The suspect was then placed in an OHA vehicle containing the rock so that possession of the cocaine would be attributed to him." ((Declaration of Khaveo Barryer, Former OHA Officer, Exhibit 5 at page 4)

> "I was involved in a juvenile narcotics case in which Sergeant David Watson and I falsified an arrest report and lied under oath. . . . We pulled up to two juveniles, who were standing in front of a bungalow in which one of them lived. We asked them to approach the car, searched them and

placed them in the back of our car for ten minutes. Watson went to a nearby brick wall and retrieved a black film container. He found some cocaine rocks inside. . . . When it came time to go to court on the case, Watson did not want me to testify and Chief Smith ordered me to follow Watson's instructions. . . . Watson testified that he had seen Wilson throw the drugs down. I testified as instructed by Watson (and by Smith) that I did not remember the incident or Wilson. I searched Wilson at the scene, but I denied that under oath. I recalled observing Wilson as long as Watson, and never saw him in possession of narcotics or dropping any drugs. I committed perjury in this case."

(Declaration of Jonathan Allen, former OHA officer, Exhibit 6 at pages 6-7)

Example 3: Tommy Walker

Tommy Walker, an employed janitor with no prior criminal history, was with friends on the street in Oakland. A few minutes earlier they had been playing dice. When the police approached his friends ran. Tommy, weighing 280 pounds and standing only six feet tall, did not run effectively.

He was jumped on by an officer who was a black belt in karate and who trained other officers in self-defense (Officer McQueen, the same officer who beat David Wilkins [Example 1] and who is still a member in good standing with his department). This officer broke Tommy's leg. He then claimed that he found narcotics dropped by Tommy Walker. The officer claimed:

"On the date/time listed while conducting patrol duties in an 'unmarked' patrol vehicle I observed susp. Walker standing in the driveway of 2247 E. 19th St. I pulled over and exited my vehicle to conduct routine area checks at which time susp. Walker appeared startled as he abruptly turned and began to run to the rear of 2247 E. 19th St.

Observing this unusual behavior I followed him (Walker) on foot at which time I clearly observed him as he simultaneously threw down evidence 1 and 2 to the ground. . ."

(Police Report, Page 2, Exhibit 7)

The Alameda County District Attorney dismissed charges against Mr. Walker. Mr. Walker filed a civil rights suit under 42 U.S.C. 1983 in federal court and has recently settled his case (as part of a comprehensive settlement involving 42 plaintiffs).

Example 4: Jasper Lowery

Jasper Lowery is a mentally ill young man who lives with his elderly mother in East Oakland. On June 8, 1989, a team of Oakland Housing Officers swooped down and arrested him. His mother who observed the entire incident attempted to intervene and prevent his arrest, stating that he had done nothing at all wrong. She was threatened. In the police report the officer claimed:

". . .I observed the suspect I.F.O. 1458 52nd Ave. crouched down, as I attempted to contact suspect, suspect made a suspicious tossing action with his right hand . . . I pat searched the suspect for officer safety and discovered the # 2 evidence in the right/chest jacket of suspect . . . I further retrieved the # 1 evidence which I observed suspect toss . . . "

(Police Report, Exhibit 8, page 3)

Charges were dismissed by the Alameda County District Attorney and Mr. Lowery and his mother were among the successful plaintiffs in the 42 U.S.C. 1983 action.

Example 5: Not Just The Housing Authority

The Housing Authority Investigation caught regular Oakland Police officers in its net. Exhibit 9 is part of the report of investigation from the Alameda County District Attorney's office. Exhibit 10 is documentation of operation 5 in which two Oakland Police officers were caught in a sting meant for OHA officers. The "he ran, he dropped" syndrome is a fall back in many police departments for corrupt officers. OHA is different only in that the technique was their primary method of operation.

The Oakland Police know that dropsy cases are suspect. In the D.A.'s investigative report, page 3, it describes the suspicions of Oakland Police Officer Lundquist as follows:

> "Officer Lundquist started to review the OHA reports . . . In reviewing these cases Officer Lundquist said that about 75% of them were what he classified as 'dropsy cases', . . . He told us that he compared this percentage with the Oakland Police Department Special Duty Unit, which also works as a Narcotic Task Force and their arrests for 'dropsy cases' are a small percentage of the type of arrests they make. The reason for this is because most suspects who see an officer will run and while they are running they will drop the narcotics out of view."

During undercover Operation Five (where one police investigator would place narcotics near another undercover officer [who never touched any drugs], a call would be made to OHA and the OHA officers would then arrest the person, search for the drugs and make an arrest. In each operation, the OHA officers filed false police reports. In many of the operations, they also beat the undercover officer or stole money. In Operation Five, two Oakland Police officers got caught, as follows:

> ". . . two marked Oakland Police Department patrol units arrived on the scene followed by three unmarked OHA vehicles. The black officer, who arrived in vehicle 1923 contacted the undercover officer . . . Officer Garden [OHA officer] immediately started to search the area and found the white bag at the rear porch. . . . At 2052 hours, the Black OPD officer handcuffed the Undercover Officer. Officer Garden handed him the white paper bag . . . "

(Exhibit 10, pages 57-58)

The police report however, told a different story.

"Officer A.K. Rachal # 7572P of the Oakland Police Department wrote the report. . . . As he was driving down the street he observed an individual . . . standing on the south side of the street. Due to the darkness of the street he activated his high beam lights. At that point he observed Jones discard a white bag from his left hand which fell by his left foot . . ."

(Exhibit 10, page 60)

Example 6

CASE STUDY: BEATING AND FALSE ARREST —RECREATION DIRECTOR

Two newspaper clippings describe the false arrest and beating of a local housing project recreation director by an Oakland Police Officer. (See Exhibit 13)

This recreation director was beaten and arrested when he asked an Oakland Police officer to drive more slowly in an area where there were many children playing.

The charges were dropped and a citizen's complaint against the officer was sustained by the police department. (This was the fourth sustained complaint against that particular police officer). However, the officer still patrols the area. The officer is still a member in good standing with the Oakland Police Department.

The news articles discuss the effect of the beating and arrest on the children who idolized the recreation director, a man who was considered a role model for youth. Many of these children observed the beating and the arrest. It is likely that some of these youngsters may exhibit panic in the presence of police officers based not upon guilt but upon fear. We submit that similar experiences are not uncommon.

CONCLUSION

This Amicus Brief does is not intended as an indictment of all law enforcement in Oakland. However, the actions of a minority of bad cops can poison our communities and hamper the performance of the majority of good cops.

It is exceedingly difficult to disprove "he ran, he dropped" allegations and it is exceedingly easy to manufacture such probable cause to arrest. Expanding police power in this area will not ease the job of law enforcement. Instead, it will fortify the defenses of the unethical police officer and make it more difficult to separate out the bad apples.

An overburdened judicial system cannot effectively attack an officer's veracity *unless there are other objective factors against which the truth of the officer's testimony may be tested.* Current standards of cause to detain and probable cause to arrest to some degree require objective (i.e. testable/contestable) verification. The "he ran" or "he looked nervous at my approach" scenario is totally subjective. The ability of an officer to "charge" after a "suspect" on those grounds and to retain any object which is "dropped", is in essence a license to conduct a general search based upon a "hunch".

From experience we know that such "hunches" will be based upon race, age, economic status and cultural factors, i.e. young, Black males will be disproportionately subject to a general search.

A trained and honest officer does not need the changes urged by the Attorney General in *Hodari D.* Drug sales are by necessity, made to strangers, in the open and in plain view. There is no mystery as to how to catch drug dealers. They operate in plain view and they will sell to anyone who is not wearing a uniform. Making legitimate drug arrests is as easy as shooting ducks in a pond. While the task is more difficult for uniformed officers, the answer is to use more undercover officers to make buys, not to provide powers which amount to the right to make non-cause searches.

Accordingly, the decision of the California Court of Appeal in *Hodari D.* is correct, and the position of the California State Attorney General should be rejected by this court.

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In the

Supreme Court of the United States

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

HODARI D.,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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39 pp

QUESTIONS PRESENTED

I.

WHETHER THE RESPONDENT WAS "SEIZED" WITHIN THE MEANING OF THE FOURTH AMENDMENT BECAUSE, IN VIEW OF ALL OF THE CIRCUMSTANCES SURROUNDING THE INCIDENT, A REASONABLE PERSON WOULD HAVE BELIEVED THAT HE WAS NOT FREE TO LEAVE.

II.

WHETHER THE EVIDENCE SEIZED WAS "FRUIT OF THE POISONOUS TREE".

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INTEREST OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of more than five thousand lawyers who are citizens of every state. Members include state and federal judges, advocates, and law professors, whose positions bring them into daily contact with the criminal justice system. Tne NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL, founded more than twenty-five years ago, is dedicated to the preservation and improvement of our adversary system of justice.

The Amicus Curiae Committee of the NACDL has concluded that the issues in this case are of such importance that the NACDL seeks to offer its assistance to the Court. Both the petitioner and the respondent have consented to participation by NACDL as amicus curiae and their written consent has been filed with the Court.

SUMMARY OF ARGUMENT

A police officer ran directly toward the respondent, blocking his path, admittedly to stop him, at which time the respondent discarded incriminating evidence. The California Court of Appeal held that the respondent was "seized" within the meaning of the Fourth Amendment before he discarded the evidence because in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Applying, *inter alia*, this Court's decision in *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975 (1988), the Court of Appeal

reasoned that the police conduct would have communicated to the reasonable person an attempt to capture or otherwise intrude upon the respondent's freedom. That the officer possessed no reasonable and articulable suspicion that the respondent had done anything wrong was not disputed by the petitioner in the California Court of Appeal. Finding no such reasonable and articulable suspicion, the Court of Appeal held that the seizure was violative of the Fourth Amendment. Because the act of discarding was the direct and proximate result of the illegality, the Court of Appeal ordered suppression.

The petitioner proposes various new tests for determining when a person has been "seized" for the purposes of the Fourth Amendment. These tests are fashioned so as to remove the police conduct in the case at bar from the ambit of the Fourth Amendment. The Court should reject, as it did in *Chesternut*, any bright-line approaches to Fourth Amendment investigatory stop issues. The case at bar was properly resolved below by the application of the necessarily flexible tests designed by this Court to address the varied factual scenarios presented by Fourth Amendment "seizure" issues. Consequently, this Court should approve the lower court's application of the proper legal standards to the fact-specific circumstances of this case. *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684, 1690 (1990).

Similarly, the Court of Appeal properly applied this Court's decisions regarding "fruit of the poisonous tree" in finding suppression warranted because the challenged evidence was obtained as a direct result of the illegal detention.

In so ruling, California, like other states, has sought to shield its citizens from unjustified intrusions by the police. The ruling sought by the petitioner would not only

undermine that state interest, but would also unwisely limit this Court's authority to review police-citizen encounters.

ARGUMENT

I.

THE RESPONDENT WAS "SEIZED" WITHIN THE MEANING OF THE FOURTH AMENDMENT BECAUSE, IN VIEW OF ALL OF THE CIRCUMSTANCES SURROUNDING THE INCIDENT, A REASONABLE PERSON WOULD HAVE BELIEVED THAT HE WAS NOT FREE TO LEAVE.

A. This Court's Decision In *Chesternut* Mandates Affirmance.

The petitioner argues that the Court should adopt a rule that Fourth Amendment protections can never be afforded an individual in the absence of actual physical control obtained by the police through the use of force or display of authority. The petitioner's bright-line approach is no more palatable now than when it was urged in *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 1979 (1988), where the Court chastised the parties for having

> failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account " 'all the circumstances surrounding the incident' " in each individual case. *INS v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984), quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.).

Accordingly, the Court refused in *Chesternut* to adopt either the petitioner's argument that the Fourth Amendment is never implicated until an individual stops in response to a police show of authority, or the respondent's argument that all police "chases" are Fourth Amendment seizures. Instead, the Court measured the particular facts in *Chesternut* against the holding in *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1979 n. 16, 20 L.Ed.2d 889 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."), and the *Terry*-based "objective" test announced in *United States v. Mendenhall, supra*, and later embraced by the Court. See *INS v. Delgado*, 466 U.S. at 215, 104 S.Ct., at 1762. See also *Florida v. Royer*, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326-27, 75 L.Ed.2d 229 (1983) (plurality opinion); *id.*, at 514 (BLACKMUN, J., dissenting). That test provides that an individual is seized within the meaning of the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Chesternut*, 108 S.Ct., at 1979, quoting *Mendenhall*, 446 U.S. at 554, 100 S.Ct., at 1877.

Applying these holdings to the facts in *Chesternut*, the Court found no seizure where a police car was merely driving parallel to the running defendant, reasoning as follows:

> [T]he police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement.

Chesternut, 108 S.Ct., at 1980. The Court added:

> Without more, the police conduct here — a brief acceleration to catch up with respondent, followed by a short drive alongside him — was not "so intimidating" that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business.

Id., at 1981. Although the police conduct in *Chesternut* had been termed a "chase" by the officer and the magistrate, the Court deemed that characterization was insufficient, in and of itself, "to implicate Fourth Amendment protections", *id.*, at 1980, where the record was devoid of any evidence that the respondent would have reasonably perceived an attempt to interfere with his freedom. Thus, the police "were not required to have 'a particularized and objective basis for suspecting [respondent] of criminal activity' in order to pursue him." *Chesternut*, 108 S.Ct., at 1981, quoting *United States v. Cortez*, 449 U.S. 411, 417-418, 101 S.Ct. 690, 694-695, 66 L.Ed.2d 621 (1981).

The facts in the case at bar are materially different. In running toward and blocking the path of the respondent, the officer's actions spoke louder than words, carrying the unambiguous message that the respondent could not proceed and the officer was about to seize him. At the suppression hearing, the officer testified that he intended to cut off the respondent and stop him.[1] There can be no doubt

[1]Although the uncommunicated subjective intent of the officer does not determine whether a Fourth Amendment seizure has taken place, see *Chesternut*, 108 S.Ct., at 1980 n. 7, unlike in *Chesternut*, where it was nevertheless deemed noteworthy that the goal of the officer was "not to capture the respondent but to see where he was going", *id.*, *cf. Mendenhall, supra*, 446 U.S. at 575, nn. 12-13 (WHITE, J., dissenting), here, it is noteworthy that the officer's admitted goal was to stop the respondent and question him.

The lower state courts in *Chesternut* found a seizure relying upon *People v. Terrell*, 77 Mich. App. 676, 259 N.W. 2d 187 (1977), and *People v. Shabaz*, 424 Mich. 42, 378 N.W. 2d 451 (1985), cert. dismissed, 478 U.S. 1017, 106 S.Ct. 3326, 92 L.Ed.2d 733 (1986), in each of which an officer

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that in this case the officer's conduct amounted to and communicated "an attempt to capture or otherwise intrude upon respondent's freedom of movement." *Chesternut*, 108 S.Ct., at 1980. No reasonable person in the respondent's place would have believed himself "free to disregard the police presence and go about his business." *Id.* Indeed, the respondent was attempting to leave the officer's presence but the officer would not allow it by blocking his path.

The California Court of Appeal followed this Court's "clear direction" that determination of whether police conduct implicates the Fourth Amendment turns upon the circumstances of each individual case. *Chesternut*, 108 S.Ct., at 1979. Accordingly, the court properly applied to the circumstances the objective test of whether the respondent would have reasonably believed he was not free to leave and correctly reached the conclusion that the police conduct in this particular case effected a "seizure" within the meaning of the Fourth Amendment. See *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684, 1690 (1990) (state court's fact-specific application of proper legal standard should not be disturbed).

B. The Petitioner's Proposed Tests For "Seizure" Conflict With Various Decisions Of This And Other Courts.

The petitioner argues that *Mendenhall* does not define "seizure" in terms of whether a reasonable person would

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chased the defendant on foot after which the defendant abandoned inculpatory evidence. This Court found *Terrell* and *Shabaz* distinguishable from the facts in *Chesternut* because in *Shabaz*, the state apparently stipulated that the clear object of the chase was to apprehend the defendant, and in *Terrell*, "the goal of that chase appears to have been equally clear." *Chesternut*, 108 S.Ct., at 1980 n. 8. Here, by contrast, the officer blocked the respondent. Furthermore, the officer's intent to seize is indisputable.

believe that he was free to leave. While recognizing that "it has generally been assumed" that *Mendenhall* offers such a definition of "seizure", the petitioner boldly claims that "[t]his view is erroneous." Petitioner's Brief at 17. Instead, the petitioner informs us, the *Mendenhall* test "explicates only the requirement of a show of authority". *Id.* Once *Mendenhall* is so viewed, the petitioner's argument continues, it can then be advanced (without fear of contradiction by *Mendenhall*) that a "seizure" requires actual physical restraint.

It is difficult to believe that *Mendenhall* can be read as not offering a definition of "seized". The Court's language could hardly be clearer:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. [footnote omitted] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. [citations omitted] In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Mendenhall, 446 U.S. at 554-55, 100 S.Ct., at 1877. The petitioner's claim that this language defines "show of authority" and not "seizure" is not supported anywhere in

the decision. But without such a tortured reading of *Mendenhall*, the petitioner's argument would fail.

Similarly, the Solicitor General advances a dubious reading of *Mendenhall*, claiming not only that the test is limited to determining whether an initially consensual encounter has transformed into a "seizure", but also that the test applies only to determine whether a "seizure" has occurred where the individual has "remained" in the police presence. Brief of Solicitor General at 13-14.

It is true that the *Mendenhall* test arose in the context of a police-citizen airport encounter. In such cases, where the issue is often whether police conduct has transformed an initially consensual encounter into a "seizure", the objective test is recognized as particularly helpful:

> What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall, supra*, 446 U.S. at 554, 100 S.Ct., at 1877 (footnote omitted); see *Florida v. Royer*, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983) (plurality opinion).

Delgado, 446 U.S. at 215, 104 S.Ct., at 1762. But it does not follow that the *Mendenhall* test applies only to such circumstances or only where the individual has "remained" in the presence of police. If such were the case, then the Court would not have employed the test in *Chesternut*, where there was neither an initially consensual encounter nor an individual who "remained" in the presence of police. *Chesternut* decisively instructs that the *Mendenhall* test is

to be applied broadly to all types of settings and encounters and without regard to how the individual reacts to the police:

> The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs. Compare *United States v. Mendenhall, supra* (considering whether police request to see identification and ticket of individual who stopped upon police's approach constituted seizure), with *INS v. Delgado, supra* (considering whether INS "factory survey" conducted while employees continued to move about constituted seizure of entire work force).

While the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police. The test's objective standard — looking to the reasonable man's interpretation of the conduct in question — allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. 3 W. LaFave, Search and Seizure § 9.2(h), pp. 407-408 (2d ed. 1987). This "reasonable person" standard also ensures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.

Chesternut, 108 S.Ct., at 1979-1980. Thus, *Mendenhall* promulgated a test for all settings and is not limited as the petitioner claims.

Even within the context of initially consensual encounters, the petitioner's proposed requirement of actual restraint is problematic. With such a requirement, a consensual encounter would not be transformed into a seizure or detention, even if the circumstances would lead a reasonable person to believe that he was not free to leave, unless the police took some additional step that amounted to imposing physical restraint. Such a result would conflict with the Court's decisions in *Chesternut, Delgado, Royer, Mendenhall* and *Terry*.

The petitioner also proposes the following "alternative" to *Mendenhall*: "A seizure occurs when a person *acquiesces* in what he reasonably believes to be an official display of authority." Petitioner's Brief at 18 (emphasis supplied). The petitioner explains this proposal as follows:

> To amplify further, an officer who approaches a person on the street has not effected a seizure in the narrow physical sense because the person remains physically able to walk away. If he choses [sic] not to do so, his termination of movement is self-imposed. Whether he is seized in the constitutional sense depends upon the motivation for his decision to remain. If he does so because he wishes to cooperate with the officer, it is a consensual encounter and thus no seizure. If the person remains in obedience to what a reasonable person would perceive to be a show of authority, he has been seized under the Fourth Amendment. In the *Mendenhall* context, stationary acquiescence to a show of authority is the hallmark of a seizure.

Petitioner's Brief at 21-22.

As previously noted, the Court explained in *Mendenhall* and *Delgado* that a consensual police-citizen encounter can be transformed into a "seizure" by virtue of police conduct which leads a reasonable person to believe he is not free to leave. But under the petitioner's test, such transforming police conduct would be meaningless because the determinative issue would be whether the citizen "acquiesced", which in turn would depend upon the citizen's "motivation." These new elements lack legal and logical foundations and would spawn a host of new problems all their own. Moreover, if the individual's "motivation" were determinative, then no longer would the courts, police and citizenry have the objective test's assurance "that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.". *Chesternut*, 108 S.Ct., at 1980.

Because the case at bar involves a "blocking" by an officer, an even more compelling case is presented for finding a "seizure" than one involving a "chase". Yet, in addressing chase scenarios, state courts have found that Fourth Amendment protections apply, holding there must be some reasonable and articulable suspicion that criminal activity is afoot in order to justify the chase. See, *e.g., State v. Lemmon*, 318 Md. 365, 568 A.2d 48 (Md.1990) (defendant was "seized" pursuant to Fourth Amendment when he was chased, applying *Chesternut* and *Terry*); *In re D.J.*, 532 A.2d 138, 140 (D.C.Ct.App. 1987) ("By taking up pursuit, the police communicated emphatically to D.J. that he was not free to leave" and a seizure occurred, at the latest, when officer began to chase appellant); *People v. Washington*, 192 Cal.App.3d 1120, 236 Cal.Rptr. 840 (1st Dist.Ct.App. 1987) (Fourth Amendment triggered by chase which made clear to defendant that he was not free to leave and the discarded evidence was fruit of the poisonous tree); *People v. Shabaz*,

supra (defendant was not free to go because he was pursued; "investigatory pursuit and stop" to be measured by *Terry*); *People v. Thomas*, 660 P.2d 1272 (Colo.1983) (en banc) (officers need reasonable suspicion at inception of pursuit and may not rely on facts observed during chase to justify seizure); *Commonwealth v. Thibeau*, 384 Mass. 762, 764, 429 N.E.2d 1009, 1010 (1981) ("Pursuit that appears designed to effect a stop is no less intrusive than a stop itself . . . [A] stop starts when pursuit begins."). Even prior to *Mendenhall*, the same conclusion was reached through application of *Terry*. See *People v. Terrell*, *supra* (officer exited unmarked car and chased defendant on foot after observing defendant stick hand in pocket and run at sight of officer; officer saw defendant drop clear envelope containing brown powder; officer arrested defendant after determining package might contain heroin; "investigatory pursuit" held unlawful seizure, citing *Terry*); *State v. Saia*, 302 So.2d 869 (La.1974), *cert. denied*, 420 U.S. 1008, 95 S.Ct. 1454, 43 L.Ed.2d 767 (1975) (seizure took place when police sprang from their car and overtook the defendant; police cannot approach citizens under circumstances that make it seem that some form of detention is imminent absent reasonable grounds to detain or probable cause), cited with approval by LaFave, *supra* at n.4, p.408, n.225.

Because citizen-police encounters usually involve local officers on patrol, the state courts have also had numerous occasions to address the argument that an individual's flight, without more, provides reasonable and articulable suspicion sufficient to effect a *Terry* investigatory stop. The state courts have overwhelmingly rejected this claim.[3] See *Smith*

[3]Whether the officer in this case possessed a reasonable articulable suspicion of criminal activity is an issue not before the Court. The issue was not raised by the petitioner in seeking certiorari review. Nor did the petitioner raise the issue before the California Court of Appeal, as that court expressly noted. (J.A. 138). Even if the issue had been raised, the

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v. United States, 558 A.2d 312 (D.C.App.1989) (defendant's departure at fast pace from scene upon arrival of plainclothes officers in unmarked car did not provide grounds for *Terry* stop); *Hawkins v. State*, 758 S.W.2d 255, 261 (Tex.Cr.App.1988) (Fourth Amendment violated where actions of officers were "designed to control the direction of appellant's movement by 'closing in' on him in order to detain and question him", distinguishing *Chesternut*); *State v. Epperson*, 237 Kan. 707, 703 P.2d 761 (1985) (no reasonable suspicion when two men appeared startled when they saw approaching police car, and then exited car and started to walk away); *People v. Aldridge*, 35 Cal.3d 473, 674 P.2d 240, 198 Cal.Rptr. 538 (1984) (en banc) (no reasonable suspicion when defendants attempted to avoid police); *McClain v. State*, 408 So.2d 721 (Fla.1st DCA), *pet. for rev. dismissed*, 415 So.2d 1361 (1982) (no reasonable suspicion where defendant's behavior indicated only that he wanted to avoid police); *Kearse v. State*, 384 So.2d 272 (Fla.4th DCA 1980) (no founded suspicion where defendant walked "briskly" away from police car); *Commonwealth v. Barnett*, 484 Pa. 211, 398 A.2d 1019 (1979) (when appellee attempted to leave, officers chased him down the street; police conduct was coercive, unsupported by belief of criminal activity, and weapon "abandoned" by appellee was properly suppressed), citing *Commonwealth v. Jeffries*, 454 Pa. 320, 311 A.2d 914 (1973) (*Terry* violated and "abandoned" property subject to suppression when defendant saw unmarked police car, he "quickened his pace"; officer left car, started to pursue defendant who ran and threw package; officer directed defendant to stand against wall; officer asked other officers to "hold him one minute" while officer retrieved package which contained heroin); *People v. Tebedo*, 81 Mich.App. 535, 265 N.W.2d 406 (1978) (no reasonable suspicion where defendant began running at sight of police car); *State v.*

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overwhelming weight of authority (as noted) would find no such evidence in this case.

Frazier, 88 N.W. 103, 537 P.2d 711 (Ct.App.1975) (no reasonable suspicion where police were summoned to motel for eviction, defendant ran from room and was chased and stopped by police and upon questioning ran again); *People v. Towers*, 49 A.D.2d 839, 373 N.Y.S.2d 593 (1975) (no reasonable suspicion when defendant walked away rapidly while making adjusting motion with his hands in his pocket and looking over his shoulder several times after noticing plainclothes officers). See also *Sibron v. New York*, 392 U.S. 40, 66-67, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

What society deems "reasonable" in the context of the Fourth Amendment may be gleaned from the prevailing view in the state courts. See *California v. Greenwood*, 486 U.S. ___, 108 S.Ct. 1625, 1630 (1988). Similarly, what is deemed police conduct sufficiently offensive or intrusive so as to warrant some evidentiary justification can be gleaned from the state court decisions cited above. Such rulings also advance the interest of the state courts in preventing and discouraging police abuses.[3] Under the petitioner's rule, officers would be authorized to chase, stalk, or otherwise harass an individual whom they could not legally stop. In other contexts involving the constitutional rights of the individual, police officers have been prohibited from doing indirectly that which they cannot do directly. For example, police cannot avoid the requirement of *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 306 (1980) (that a warrant must be obtained to effect an arrest in a person's home) by coercing the arrestee to exit the house. *United States v. Al-Azzawy*, 784 F.2d 890, 892-93 (9th Cir.1985),

[3]The court cautioned in *Commonwealth v. Thibeau*, *supra*, that unless the groundless police chase is forbidden, "the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion." See also *State v. Saia*, *supra* ("Police cannot actively create 'street encounters' . . ."). *Cf.*, Baldassano, Valli F., "Police Created Exigencies: Implications for the Fourth Amendment," 37 Syracuse Law Re. 147 (1986).

cert. denied, 476 U.S. 1144, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986); *United States v. Morgan*, 743 F.2d 1158, 1166-67 (6th Cir.1984), *cert. denied*, 471 U.S. 1061, 105 S.Ct. 2126, 85 L.Ed.2d 490 (1985). Similarly, where the protections of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) forbid interrogation by the police, they are likewise forbidden from conducting the "functional equivalent" of interrogation including "any words or actions on the part of the police . . . that the police know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). See also *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). The policy expressed in *Innis* applies with equal force here:

> To limit the ambit of *Miranda* to express questioning would 'place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*.'

Innis, 446 U.S. at 299, n.3, quoting *Commonwealth v. Hamilton*, 285 A.2d 172, 174 (Pa.1971).

Whether one believes the petitioner's claim that this case presents facts which occur "almost daily in the Nation's cities", Petitioner's Brief at 9, or the Solicitor General's claim that the ruling in this case "is not likely to make a difference in the analysis or the outcome of most cases", Solicitor General's Brief at 5, the Court should be alert to the police abuses, particularly at the local level, which would undoubtedly follow should the petitioner's rule be adopted.

Nor should the Court fail to consider that if the petitioner's rule were adopted, all instances of egregious or harassing police conduct lacking in actual physical restraint would be immune from review by this Court. The petitioner

acknowledges this serious concern as follows: "If such harassing law enforcement practices should eventually come before this Court, 'there will be time enough then to determine whether different constitutional principles may be applicable.' " [citation omitted] Petitioner's Brief at 46. That, of course, will not be the case if it is held that no Fourth Amendment claim can be made at all in the absence of actual physical restraint. We urge the Court to keep open the avenues of review of police-citizen encounters to ensure compliance with ever-evolving constitutional protections.

C. This Court's Decision In *Brower* Does Not Undermine *Mendenhall*, *Delgado*, Or *Chesternut*.

In further support of its argument that the Court should rule that no "seizure" can take place without actual physical restraint, the petitioner places great reliance upon the following language taken from *Brower v. County of Inyo*, ___ U.S. ___, 109 S.Ct. 1378, 1381 (1990): "Violation of the Fourth Amendment requires an intentional acquisition of physical control." Because *Brower* neither involved the issue presented here, nor addressed (much less repudiated) the objective test of *Mendenhall*, the petitioner's reliance is misplaced.

Brower, a civil rights case, found that the respondents' use of a roadblock to stop Brower's car constituted a seizure withing the meaning of the Fourth Amendment. The Court held:

> [A] roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur.

109 S.Ct., at 1382. Justice Stevens, with whom Justices Brennan, Marshall, and Blackmun joined, observed in a concurring opinion:

> The Court is unquestionably correct in concluding that respondent's use of a roadblock to stop Brower's car constituted a seizure within the meaning of the Fourth Amendment.

Id., at 1383.

Brower reiterated that " '[w]henever an officer restrains the freedom of a person to walk away, he has seized that person.' " *Id.*, at 1380, quoting *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). *Garner*, in turn, cited *Mendenhall* to illustrate that "it is not always clear just when minimal police interference becomes a seizure." *Id.*, at 7, 105 S.Ct., at 1699.

Brower does not hold that *only* if there is an actual taking can there be a seizure. *Brower* turned upon *intentional* acquisition of physical control as an element of seizure, as distinguished from *accidental* or *unintentional* control. *Id.*, at 1381. The statement in *Brower* that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control", does not mean, as the petitioner claims, that there must literally be an actual taking of the person. *Brower* recognizes that a Fourth Amendment "stop" can be effected by a show of authority. "The pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit . . .". *Brower*, 109 S.Ct., at 1381. However, because Brower was stopped by his loss of control of the car and subsequent crash, there was no seizure by intentional governmental conduct. Had Brower stopped in response to the show of authority, the Fourth Amendment would have been triggered. Thus, *Brower* stands for the

proposition that in order to implicate the Fourth Amendment, the governmental termination of freedom of movement must be through means *intentionally* applied. *Brower* does not purport to revise or revoke the standards for evaluating police-citizen encounters relied upon in *Chesternut, Delgado, Mendenhall, Royer* or *Terry*. The two state court decisions that have addressed *Brower* in this context, the decision of the Court of Appeal in the case at bar and the decision in *State v. Lemmon*, 318 Md. 365, 568 A.2d 48 (Md.1990), reached the same conclusion.

The California Court of Appeal in this case was understandably perplexed at the petitioner's reading of *Brower* and concomitant claim that the Fourth Amendment was inapplicable because the officer did not actually stop the respondent, noting that such an approach

> would be contrary to many years of Supreme Court precedent stating that no physical restraint is necessary to constitute a detention. (*Adams v. Williams* (1972) 407 U.S. 143, 146 [involuntary rolling down of vehicle window in response to officer's request denoted a "forcible stop"]; *Terry v. Ohio* (1967) 392 U.S. 1, 19 fn. 16 ["[o]nly when the officer, by means of physical force *or show of authority*, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."].)

(J.A.135-36) (emphasis by court).[4]

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[4]The Court of Appeal also rejected the argument that because in *Brower* this Court cited *Hester v. United States*, 265 U.S. 57 (1924), the entire Court had adopted the suggestion of the concurring opinion that Fourth Amendment protections are not implicated until the police conduct "achieves a restraining effect." *Chesternut*, 108 S.Ct., at 1981 (KENNEDY, J., concurring). The Court of Appeal correctly reasoned that *Hester* has "no application to illegal detentions, nor does it purport to

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The Court of Appeal correctly perceived the petitioner's reading of *Brower* as conflicting with the holding of *Terry* that a seizure occurs when a citizen's liberty is restrained in some way by means of physical force *or* a show of authority. 392 U.S. at 19 n. 16, 88 S.Ct., at 1879 n. 16. The petitioner argues that because the language in *Terry* provides that the "show of authority" must have "restrained the liberty" of the citizen, actual physical restraint is always required. However, *Terry* does not say that the citizen himself must be physically restrained. A "seizure" has occurred where the show of authority has, "in some way restrained the liberty of the citizen". *Id.* The use of the broad and flexible term "some way" refutes the petitioner's argument that there is only "one way." "Restrained" means limited or restricted. "Liberty" refers to the individual's right to freedom and in a Fourth Amendment context includes one's "liberty interest in proceeding with his itinerary". *United States v. Place*, 462 U.S. 696, 708, 103 S.Ct. 2637, 2645, 77 L.Ed.2d 110 (1983). See also *Florida v. Royer*, 460 U.S. at 498, 103 S.Ct., at 1324 (plurality opinion) (a person approached by police "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way . . . ."). Here, the respondent was "seized" under the *Terry* test because "in some way", i.e., by the officer running at and blocking the path of the respondent, the respondent's "liberty" interest (in proceeding with his own intinerary) was "restrained" because his freedom of movement was violated when the officer would not let him go on his way. The petitioner's view of *Terry* renders meaningless the right to leave.[5]

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define what constitutes a detention". (J.A. 136). *Hester* was cited in *Brower*, the Court of Appeal stated, "to illustrate its statement that the term 'seizure' could not be applied to an unknowing act". *Id.*

[5]Here again the petitioner's test leads to an absurd result as well as conflict with *United States v. Place, supra*. The petitioner argues: "A

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In *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), an officer on patrol in a high-crime area was advised that a person seated in a nearby vehicle was carrying drugs and had a gun. The officer approached the vehicle and tapped on the window. The officer asked the occupant, Williams, to open the door. When Williams instead rolled down the window, the officer reached in and removed a gun from Williams' waistband. Williams was then arrested for unlawful possession of the gun. Upholding the seizure, the Court held that under *Terry*, the information possessed by the officer was sufficiently reliable "to justify the officer's *forcible stop* of Williams." *Id.*, at 147 (emphasis supplied). See also *United States v. Place*, 462 U.S. at 702-703, 103 S.Ct., at 2642. Even though there was no actual physical control, the police conduct was characterized as a "forcible stop" within the meaning of *Terry*. Thus, the lower court correctly found that both *Adams v. Williams* and *Terry* were at odds with the petitioner's argument.

The result reached below is neither unjust, unduly restrictive, nor difficult to implement. It is not unjust because persons who have done nothing wrong should not be subject to police harassment. Even one who runs from authority should be free to go on his way. It has long been

> a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as

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person with the options of movement which respondent possessed is not in the 'physical control of a police officer, although the officer has blocked the path of that person." Petitioner's Brief at 34. Under this view, an officer could prevent a citizen from proceeding with his itinerary by blocking his path as long as some other "options of movement" were available. Such a rule would undermine one's "liberty interest in proceeding with his itinerary." *United States v. Place*, 462 U.S. at 708, 103 S.Ct., at 2645.

> witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion."

Alberty v. United States, 162 U.S. 499, 511, 16 S.Ct. 864, 868, 40 L.Ed. 1051 (1896).[6] See also *Wong Sun v. United States*, 371 U.S. at 483 n. 10, 83 S.Ct., at 415 n. 10. One might also run from a police officer due to fear of harassment, embarrassment (from being homeless, jobless, mentally or physically disabled), or prior brutal or otherwise distasteful experiences with police. The Solicitor General, apparently recognizing that one should be free to run in the absence of wrongful conduct, makes the claim that the "respondent was free throughout — in the sense contemplated by *Terry* — to act as he chose: to remain on the street, to walk away, or even to run." Brief of Solicitor General at 15. But the record proves otherwise. It would be accurate to state that the respondent *should have been* free to remain, walk, or run, but was not, because he was blocked when he tried to exercise that freedom.

Nor is the ruling below unduly restrictive. The degree of police intrusiveness permitted must necessarily be proportional to the quality of information possessed by the officer.[7] In the absence of any evidence whatsoever of

[6]Contrary to *Alberty*, the petitioner argues that the quotation from Proverbs does apply in this criminal case. Petitioner's Brief at 39.

[7]The reasonableness of an intrusion under the Fourth Amendment can be measured by a three-factor assessment: "(i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise." *Mendenhall*, 446 U.S. at 561, 100 S.Ct., at 1881 (Powell, J., concurring). Applying these factors in *Mendenhall*, Justice Powell found no unreasonableness because (i) the officers were "carrying out a highly specialized law enforcement operation designed to combat the serious societal threat posed by narcotics distribution", *id.*, (ii) the intrusion was such that "the respondent could
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wrongful conduct, an officer's pursuit and blocking of a person's path with the obvious intent to stop cannot be justified. In such a case, the officer must pursue a less invasive course, if he so desires.

The petitioner asks what a police officer is to do upon seeing a person run away from him. Petitioner's Brief at 40. Whenever an officer of the law sees a person is running away from him, if there is a reasonable articulable suspicion of criminal wrongdoing, the officer is free to conduct an investigatory stop under *Terry*. When, however, a citizen engages in behavior which might arouse the officer's curiosity, but the officer possesses no evidence whatsoever of wrongdoing, as is the case here, the officer, while not free to block, stop and question, does remain free to initiate investigation or surveillance, as long as the person's rights to leave the officer's presence and be let alone are not violated. There might someday be a case where even following or stalking could implicate the Fourth Amendment.[8] The

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not reasonably have felt frightened or isolated from assistance", *id.*; and (iii) the officers' observations indicated reasonable suspicion of illegal activity. By contrast here, (i) the officers were on routine patrol; (ii) the intrusion was such that the respondent could not but feel extremely frightened as evidenced by the officer's testimony that the respondent appeared "startled", and (iii) the officer possessed not a scintilla of evidence of criminal activity. "In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979).

[8]In *In re D.J.*, 532 A.2d 138, 140 n.1 (D.C.CtApp. 1987), the court noted:

> The motions judge found, and the government has conceded at oral argument on appeal, that the *Terry* stop occurred at the commencement of the footrace. D.J. contends that the stop occurred at some unspecified point earlier in the encounter, when, by continually "stalking" his movements in their car, the

(Footnote continued on next page)

possibility of such a case and countless others further underscores the need to avoid bright-line rules in police-citizen encounter cases. See *INS v. Delgado*, 466 U.S. at 215, 104 S.Ct., at 1762 ("Given the diversity of encounters between police officers and citizens . . . the Court has been cautious in defining the limits imposed by the Fourth Amendment.")

Finally, the ruling, as an application of the objective test, is not difficult to implement. As the Court stated in *Chesternut*: "The test's objective standard — looking to the reasonable man's interpretation of the conduct in question — allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." 108 S.Ct., at 1980. Officer Pertoso knew in advance that the person he ran into would reasonably believe he was not free to leave. Such police conduct is consistent with Fourth Amendment protections only if the officer possesses some evidence of wrongdoing.

D. The Petitioner's Literal View Of "Seizures" Is Inconsistent With The Rights Protected By The Fourth Amendment.

In placing a literal construction upon the Fourth Amendment by arguing that the word "seizures" connotes actual physical restraint, the petitioner has ignored the history of the amendment and the privacy and personal security rights it seeks to preserve.

(Footnote continued from previous page)

> police led him to reasonably believe that he was not free to leave. It might be difficult to pinpoint exactly when, if ever, during this gradually escalating encounter, a reasonable person would feel he was no longer free to decline contact with the police. Fortunately, we find it unnecessary to do so in order to decide this case. We leave the question open, deciding only that the seizure occurred, *at the latest*, when Sergeant Miller began to give chase on foot.

The privacy right which the respondent sought to exercise was the "right to be let alone" which Justice Brandeis explained in this now familiar passage:

> [The makers of our Constitution] conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478-479, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (BRANDEIS, J., dissenting).

Historically, the scope and purpose of the Fourth Amendment's privacy guarantee has never been limited to the terms of the amendment itself. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty . . . .". *Boyd v. United States*, 116 U.S.616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, 751 (1885).

The respondent's rights to privacy and personal security travelled with him on the public streets. *Terry v. Ohio*, 392 U.S. at 9, 88 S.Ct., at 1873; *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry*, 392 U.S. at 8-9, 88 S.Ct., at 1873. The Fourth Amendment protects the right to freedom of movement, see *Terry*, 392 U.S. at 34 (Harlan, J., concurring), and the right to proceed with one's chosen itinerary. *United States v. Place*, 462 U.S. at 708, 103 S.Ct., at 2645.

"Time and again this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it." *Olmstead*, 277 U.S. at 476, 48 S.Ct., at 572 (BRANDEIS, J., dissenting). Since *Olmstead*, the Court has remained steadfast in its resolve. For example, the Court eventually rejected the argument that an actual physical trespass is necessary to a finding of an unreasonable search by electronic surveillance. *Katz v. United States, supra*. In *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), the Court ruled that even when a suspect's detention does not meet all of the technical elements of a "traditional arrest", probable cause is nevertheless required where the detention in "important respects" is indistinguishable from an arrest. 442 U.S. at 212, 99 S.Ct., at 2256. And in *United States v. Place*, 462 U.S. at 708, 103 S.Ct., at 2645, the Court held that an air traveler who is technically free to leave may still be "effectively restrain[ed]" by the seizure of his luggage.

Even if an actual restraint were required for a "seizure", such took place here, as the lower court found:

> [W]e believe that the facts of the instant case illustrate a situation tantamount to a physical seizure. Appellant, who was running down the sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a jacket marked "police", who was 11 feet away and running toward him.

(J.A. 137). This finding is amply supported by the record and should not be disturbed. *Minnesota v. Olson, supra*. Such circumstances give rise to a "seizure" even under the petitioner's tests because the respondent was blocked by the officer at which time the respondent was in the presence of the officer and "remained" in the officer's presence because of threatening and coercive conduct.

II.

THE EVIDENCE SEIZED WAS "FRUIT OF THE POISONOUS TREE".

The Solicitor General claims the following:

> The Court of Appeal determined that the officers recovered the drugs "through exploitation of their illegal activity" and "as a direct result of that action," Pet. App. 18, but that conclusion is mistaken. To begin with, the court did not distinguish between the drugs respondent jettisoned *before* he saw Officer Pertoso, which Officer McColgin retrieved when he retraced respondent's escape route, from the drugs respondent that discarded [sic] *after* he saw Officer Pertoso. That distinction is important since respondent plainly had not been "seized" when he abandoned the bag of crack along his escape route. That bag should not have been suppressed, because the officers did not obtain it as the result of an unlawful seizure of respondent.

Brief of Solicitor General at 16-17.

The facts are not as the Solicitor General states. The record does *not* establish that the respondent "jettisoned" any evidence before he saw Officer Pertoso. When Officer Pertoso ran toward the respondent and startled him, the respondent discarded one cocaine rock. The respondent was not seen in the possession of any of the other drugs found in the bag by Officer McColgin along the route where the individuals had been seen running. The abandonment issue arises with regard to the one discarded rock. The bag and its contents are not at issue.

Applying the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States, supra*, the teachings of *United States v. Crews*, 445 U.S. 463, 470, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 621 (1981) (the exclusionary rule "applies to any 'fruits' of a constitutional violation"), and the factors discussed in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) for determining whether evidence obtained was the product of the defendant's free will (e.g., temporal proximity of the illegality to the discovery of the evidence, presence of intervening circumstances, and the purpose and flagrancy of the police misconduct), the Court of Appeal had no difficulty concluding that "the challenged evidence was obtained as a direct result of the illegal detention" warranting suppression (J.A. 143-44), reasoning as follows:

> Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer's stated purpose in pursuing appellant was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's acts were unfounded, as he admitted he originally saw nothing suspicious other than four Black youths standing near a car. Appellant's act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence.

(J.A. 142-43). Citing *United States v. Pirolli* 673 F.2d 1200, 1204 (11th Cir. 1982) and *United States v. Beck* 602 F.2d 726, 730 (5th Cir. 1979), the Court of Appeal concluded: "To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction." *Id.*

Again, as was the case in *Minnesota v. Olson, supra*, the state court has resolved the issue with a "fact-specific application of the proper legal standard." 110 S.Ct., at 1690. The petitioner does not suggest otherwise, but urges adoption of a new rule that absent evidence of a police officer's intent to search, the officer's illegal conduct that prompts an individual to discard incriminating evidence is constitutionally irrelevant. According to the petitioner, such a rule is supported by *Brower v. City of Inyo, supra*, and *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), which is cited in *Brower*.

Brower is inapposite having nothing to do with fruit of the poisonous tree or abandonment. *Hester*, of course, announced the "open fields" doctrine: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." 256 U.S. at 59. *Hester* held that there was no unlawful search because the open fields are not protected. No such issue is involved here. Additionally, the facts in *Hester* are distinguishable. The authorities in *Hester* had witnessed incriminating activities before pursuing the defendant. No wrongful conduct by the respondent was first observed in the case at bar. Also, the act of discarding whiskey bottles in *Hester* was not preceded by any illegal government activity, whereas the respondent in the case at bar discarded the rock in direct response to the illegal police conduct. Thus, the abandonment in *Hester* was voluntary whereas the contrary is true here. The only arguably illegal activity in *Hester*, a trespass, occurred *after* the defendant had thrown the bottles. Additional consideration must be given to the era in which *Hester* was decided: "Not surprisingly, the very brief (two paragraphs) opinion in *Hester* does not address the then-nascent fruit-of-the-poisonous-tree doctrine." LaFave, *supra*, § 9.2, n.272.9 (1990 Pocket Part).

The reasoning of the lower court and its reliance upon this Court's decisions in *Wong Sun*, *Brown*, and *Crews* was correct. See also *Taylor v. Alabama*, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); *Dunaway v. New York, supra*. The correctness and reliability of the decision below is underscored by the petitioner's concession of the causal connection between the officer's conduct and the discarding of the evidence as follows:

> We acknowledge that in this case the taking was the result of governmental action, for respondent indisputably abandoned the rock in reaction to the approaching officer.

Petition for a Writ of Certiorari at 27.

The California Court of Appeal also found that under the facts of the case, suppression would further the policy underlying the exclusionary sanction:

> The purpose of the exclusionary rule to deter illegal police conduct is served by our decision. "Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such Fourth Amendment violations in future cases." (4 LaFave, Search and Seizure, *op. cit. supra*, § 11.4(j), pp. 450-460.) If the police had no legal ground to obstruct appellant's path, exclusion of the evidence obtained as a direct result of that action serves to deter the repetition of such unfounded detentions.

(J.A. 143).

The ruling below is in complete accord with the decision of this and other courts and should not be disturbed. *Minnesota v. Olson, supra.*

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

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Dated: December 17, 1990.

DEC 19 1990

No. 89-1632

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

HODARI D.,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

BRIEF AMICUS CURIAE OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RESPONDENT

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36 pp

QUESTIONS PRESENTED

1. Was Respondent seized within the meaning of the Fourth Amendment?

2. Was the single rock of cocaine correctly suppressed?

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BRIEF AMICUS CURIAE OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

California Attorneys for Criminal Justice (CACJ) is a statewide criminal

defense organization composed of approximately 2,600 lawyers from various states as well as law students and related professionals active in the defense of criminal cases.

One of the objectives of the organization is to protect and insure by rule of law those individual rights guaranteed by the United States and California Constitutions and to resist all efforts made to curtail these rights.

Among the standing committees of the organization is an Amicus Curiae Committee. The tasks of this committee are to identify cases and issues involving those rights which the organization seeks to protect and to submit briefs in those cases where it is believed they will assist the Court in the proper administration of criminal justice.

SUMMARY OF ARGUMENT

1. The question left open by the Court in Michigan v. Chesternut, 466 U.S. 210, 108 S.Ct. 1977, 1978 (1988) -- "whether the act of fleeing, by itself, was sufficient to constitute reasonable suspicion justifying the seizure" -- is not before the Court. Two lower courts found and Petitioner conceded below and here that there was no reasonable suspicion to detain Respondent. These dual findings and Petitioner's concessions bind this Court. The attempt by Petitioner's amici curiae, to resurrect this issue, not raised by the parties, must fail.

Thus, even if the Court concludes, as Respondent and amicus strongly contend it should not, that the Court of Appeal erred in determining that Respondent was detained, that ends the matter. Id. cf. Brower v. County of Inyo, __ U.S. __, 109 S.Ct. 1378, 1383 (1989)

(Opinion of Stevens, J., with whom Brennan, J., Marshall, J., and Blackmun, J., join, concurring in the judgment).

2. Conversely, if a plurality of the Court determines that the Court of Appeal correctly concluded Respondent was seized, the only remaining question is whether the single cocaine rock was properly suppressed. The Court need not, and amicus submits should not, yield to Petitioner's and his amicis' urgings to: (1) overturn the Mendenhall - Chesternut seizure definition in favor of one based on antiquated property law concepts, eighteenth century dictionaries and dicta in Brower v. County of Inyo, supra, 109 S.Ct. at 1380-1382 and make actual restraint or so-called "stationary acquiescence" the sin qua non for seizure; (2) redefine reasonable suspicion as flight from police; and (3) add an

"inevitable-illegal-search" tier to the fruit of the poisonous tree doctrine.

ARGUMENT

I.

THE ISSUE OF REASONABLE CAUSE TO DETAIN HODARI D. IS NOT BEFORE THE COURT

Respondent's motion below (Welf. & Inst. Code § 700.1) sought to suppress:

> All physical (and intangible) evidence seized or obtained as a result of the following deprivations of the minor's liberty and right to privacy, including that resulting from: the minor's detention. Joint Appendix (J.A.) 3.

The trial court denied the motion, but found that the police had no reasonable suspicion to detain Hodari D. before he discarded the single rock of cocaine (J.A. 54-55, 73, 99). In reviewing the denial of the motion to suppress, the Court of Appeal

of the State of California accepted this finding by the trial court and held it was supported by substantial evidence. The court correctly observed that, "[s]ince only the police officers testified in this case, the facts are undisputed." J.A. 131. The court then independently reviewed and upheld the trial court's finding under the Constitutional standard of reasonableness. J.A. 131.

The trial court's finding essentially rests on its determination of factual issues. See United States v. Nixon, 418 U.S. 683, 702 (1974). Therefore, this Court will not overturn that finding unless it has no support in the record. Ibid. Traditionally, this Court has been reluctant to disturb findings of fact in which two courts below have concurred. Rogers v. Lodge, 458 U.S. 613, 623 (1982).

In the Court of Appeal, Petitioner (Respondent below), Attorney General of the State of California, did not dispute the trial court's finding and rested his case instead on the argument that no detention had occurred before the rock of contraband was discarded. J.A. 138. Here, the Attorney General did not present the issue of reasonable cause to detain Hodari D. in his Petition for Writ of Certiorari or in his Brief[1].

On this record, it could not be plainer that Petitioner's concession, and the identical findings concurred in by two courts below, are binding on this Court. Arizona v. Hicks, 480 U.S. 321, 326 & n.* (1987) (Arizona's concession that the police did not have probable cause to search precluded consideration by this Court whether the

[1] But see Brief for Petitioner at pp. 38 n.4, 39-46.

probable cause standard was satisfied). See Steagald v. United States, 451 U.S. 204, 210 & n.5 (1981) (Government's explicit concessions regarding "standing" in the Fourth Amendment context held binding in this Court).

Despite this record and the prohibition against amici curiae presenting additional questions or arguments not made by the parties[2] (e.g., United Parcel Service, Inc.

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[2] Amicus curiae, Appellate Committee of the California District Attorneys Association (Appellate Committee), erroneously contends that the issue of reasonable suspicion for detention was raised by Respondent in this Court. Amicus cites the entire argument section of Respondent's Brief. This general citation to Respondent's entire brief self-servingly misstates: Questions Presented (pp. I, 8, 17) and their discussion (pp. 8-23).

The reason for this mischaracterization is that Amicus Appellate Committee's entire brief is devoted to trying to prove on review before this Court that the facts articulated by the police officers, especially the flight of the suspects, provided reasonable suspicion to detain them. (Br. pp. 3, 5-20).

v. Mitchell, 451 U.S. 56, 60 n.2 (1981); Bell

Although amicus curiae United States does not attempt to present the question of reasonable suspicion to detain Hodari D. (Br. (I)), acknowledges that California has not raised the reasonable suspicion argument in its petition, and states for that reason amicus has not discussed it in its brief (Br. p. 4, n.2), reference to and commentary on this issue nevertheless do appear in its brief (Br. p. 4, n.2; 7).

Amicus curiae, Criminal Justice Legal Foundation devotes the bulk of its brief (Br. pp. 3-15) to attempting to establish that the minors' "flight justified a stop under Terry v. Ohio" (Br. p. 3).

Amicus curiae Wayne County Prosecuting Attorney (Wayne County) also discusses in the last section of its argument (Br. pp. 27-34) several points, "unnecessary to the resolution of this case" (Br. p. 27), including whether Respondent's flight provided reasonable suspicion for his detention.

Thus, all amici supporting Petitioner, except United States, directly seek review of an issue resolved against Petitioner by two lower courts, conceded by Petitioner in the Court of Appeal, not raised by the parties in this Court and upon which certiorari was not granted. United Parcel Service, Inc. v. Mitchell, 451 U.S. at 60, n.2.

v. Wolfish, 441 U.S. 520, 531 n.13 (1979); Knetsch v. United States, 364 U.S. 361, 370 (1970) (all refusing to consider issues not raised in this Court by the parties)), Amicus Appellate Committee characterizes Petitioner's concession as an "apparent" one and relies on Sibron v. New York, 392 U.S. 40, 58 (1968) to support the contention that this Court is not bound by it. Br. at pp. 4-5. In light of Justice Scalia's majority opinion in Arizona v. Hicks, supra 480 U.S. 321 (concurred in by Justice White, id. at 329), the language in Sibron v. New York, supra, 392 U.S. at 58, cited and relied on by amicus Appellate Committee is of questionable continuing vitality.

In any event, the facts and procedural posture of Sibron are inapposite. In Sibron, the district attorney for one New York county initially tried to justify a search on the

basis of a New York statute. He then belatedly confessed error in this Court. Id. at 47-48, 58. In an opinion by Chief Justice Warren, the Court declined to overturn a judgment of New York's highest court interpreting a state statute on Constitutional grounds based solely upon a "confession of error on behalf of the entire state, executive and judicial branches . . . made, not by a state official, but by the elected legal officer of one political subdivision within the state." Id. at 58.

Here, no statute is in issue. The concession does not affect the judgment and was made in the Court of Appeal of the State of California over a year ago by California's highest law enforcement officer. The issue was not raised by the State in this Court. Now, a deputy district attorney from one of fifty-eight counties in California, writing

for amicus Appellate Committee seeks to resurrect the point. This Court should reject this attempt by these three amici for Petitioner to use this case as a vehicle to decide one of their law enforcement agenda items.

II.

OFFICER PERTOSO'S BLOCKING OF RESPONDENT'S PATH WAS AN UNREASONABLE SEIZURE

A. Seizure of the person defined

The Fourth Amendment protects the "right of the people to be secure in their persons . . . against unreasonable searches and seizures." (Emphasis added). Amici for Petitioner have redefined the term seizure and analyzed when it occurs without adequately distinguishing among the natures of the things seized. While there are not different standards depending upon what is seized, the

item, thing or person is a circumstance which must be considered in assessing whether a seizure has occurred.

The test for determining whether an inanimate, tangible object is seized is whether there has been a meaningful interference with (someone's) possessory interest. See Maryland v. Macon, 472 U.S. 463, 469 (1985).

The test for a seizure of intangible information focuses on the reasonable expectations of privacy and personal security of the person contesting the search and seizure. Katz v. U.S., 389 U.S. 353 (1967). In Katz, the illegal seizure of intangible information in the form of the content of a telephone conversation, did not turn on any physical intrusion or physical control over

Katz or his electronically monitored and recorded words. 389 U.S. at 353-357.[3]

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[3] The act of obtaining intangible information such as viewing and writing down stereo equipment serial numbers in Arizona v. Hicks, supra, 480 U.S. at 323, viewing of the interior of a room in United States v. Winsor, 846 F.2d 1569 (9th Cir. 1988) (en banc), overhearing the words spoken in the telephone conversation in Katz, and a canine smelling the scent of contraband in United States v. Place, 462 U.S. 696, 706 (1983), all involve the acquisition of information by human or nonhuman senses. The process of obtaining this information does not fit neatly into the property-law based test for the seizure of a tangible object. See Maryland v. Macon, supra, 472 U.S. at 469.

An individual's reasonable personal security and privacy interests in avoiding the involuntary disclosure of such intangibles as the content of a telephone conversation, his luggage or the nature of consensual activity in the home are frequently far greater than the relatively insignificant interference with whatever property interest one may have in the same information. The analysis of personal privacy interests in intangible information comports with the Court's Fourth Amendment decisions since Katz which, focus on the protection of people, not places or things, from all varieties of unreasonable police conduct.

The perspective necessarily shifts when a person becomes the object of official inquiry. The definition of an arrest as a seizure of the person (Terry v. Ohio, 392 U.S. 1, 15-17 (1968)) is consistent with eighteenth century English and American notions of the actual physical possession of tangible objects and literal restraint including complete curtailment of the person's liberty and freedom of movement by custodial arrest and incarceration. However, comparisons based on seizures of tangible property break down when intangibles and restraints on liberty short of actual arrest are the objects of police conduct.

A person is seized "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . .." (Emphasis added.) Terry v. Ohio, supra, 392 U.S. at

19, n.16. Thus, the sensibility of the person seized is necessarily included in the Court's formulation of when this type of seizure occurs. A person is seized, within the meaning of the Fourth Amendment, "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (Footnote omitted.) (Emphasis added.) United States v. Mendenhall, 446 U.S. 544, 554 (1980) (Opinion of Stewart, J.). Accord Ins. v. Delgado, 466 U.S. 210, 215 (1984); Michigan v. Chesternut, 466 U.S. 215, 108 S.Ct. at 1979.

"[W]hat constitutes a restraint on liberty . . . will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." (Emphasis added.) U.S. v. Mendenhall, supra, 446 U.S. at 573.

By definition, the Court's reasonable person seizure test necessarily includes the context in which the reasonable person finds himself. The Court's consistent contextual focus on the **setting** and the type of **police conduct** emphasizes a flexible, situational approach to the "protean variety" of potential police encounters with citizens. Terry v. Ohio, 392 U.S. at 15. Contrary to the identical, previously rejected arguments readvanced here by Petitioner and his amici, Wayne County, Criminal Justice Legal Foundation, and United States (Michigan v. Chesternut, supra, 108 S.Ct. at 1979), the Court should not abandon this time tested approach in favor of a rigid, "bright-line" rule making actual physical restraint the sin qua non of personal seizures.

Petitioner and his amici, Wayne County, United States and Criminal Justice Legal

Foundation, have confused seizures of things with seizures of persons. In arguing that a seizure of a person occurs only when one's freedom of movement is literally physically retrained, Petitioner and amicis' proffered redefinition of seizure unnaturally and invalidly restricts the scope of permissible citizen responses to unwanted and unwarranted police contacts to one: so-called "stationary acquiescence." Any other reasonably foreseeable human response to intimidating or coercive police behavior is not, by their definition, a seizure.

This approach turns the Fourth Amendment on its head. The citizen, whose liberty and personal security the Fourth Amendment was designed to protect, is subordinated to a rigid, mechanistic formula claimed to promote

crime fighting.[4] This essentially property-

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[4] On the street, indeed if not at some police roll calls, this new definition in conjunction with the proffered criterion of flight alone as reasonable suspicion to detain (advanced here by amicus Wayne County, Br. at pp. 4-16), will all too quickly degenerate into: "Make 'em run. If they drop anything incriminating along the way it is: (1) off the street and (2) admissible in court. If you catch them before they discard anything incriminating, whatever the patdown search turns up is also admissible in court."

The proposed new definitions of seizure and reasonable suspicion are unworkable. Although amicus has stated, see ante at pp. 5-12, and re-emphasizes here, that the question of reasonable suspicion to detain Respondent is not before the Court, in view of the dicta in Brower v. County of Inyo, supra, 109 S.Ct. at 1383, we note that flight alone as the standard for reasonable suspicion provides the "overzealous and unscrupulous officer" with a virtually irrefutable method for creating chases and "writing-in" reasonable suspicion to stop and frisk. See Alabama v. White, __ U.S. __, 110 S.Ct. 2412, 2417 (1990) (Stevens, J., Brennan, J., and Marshall, J. dissenting); See People v. Superior Court (Kiefer) 3 Cal.3d 807, 827-828 n. 13 (1970) (furtive gesture alone insufficient for probable cause and easily fabricated).

based definition of seizure is compatible with the literal acquisition of inanimate tangible objects. It is discussed at length and clearly favored by amicus Wayne County. It also mirrors the definition penned by eighteenth century lexicographers. Amicus United States, notes its application to the in rem seizure of ships in admiralty actions. However, this definition ignores the spirit and purpose of the Fourth Amendment as consistently interpreted by the Court from Terry through Chesternut.

A search involving the movement of an object only a few inches, and uncovering nothing of any great personal value, "is much more than trivial for purposes of the Fourth Amendment".... Just as "[a] search is a search" ... (Arizona v. Hicks, supra, 480 U.S. at 325), so a seizure (of a person) is a seizure whenever a reasonable person would

have believed that he was not free to leave (Mendenhall, 446 U.S. at 554) regardless of whether varying incremental restraints on his present freedom of movement cause him to change speed, direction or to actually stop.

The salient protection of the Fourth Amendment in this context is the effect of the "misuse of power" (Byars v. U.S., 273 U.S. 28, 33 (1927)) on the state of mind of the reasonable person "in view of all the circumstances surrounding the incident" . . . (Chesternut, 108 S.Ct. at 1979) not whether a person has literally come to a stop. The Court's existing test is adequate for determining the voluntariness of the person's reaction to an express or implied assertion of authority. It is the coercive or intimidating effect of authority on the reasonable person's mind as objectively determined from all of the surrounding circumstances, not the nature or

magnitude of a particular individual's physical reaction, that is at the heart of the Fourth Amendment's protection of personal security against misuse of power.

B. **The Court of Appeal correctly applied the Mendenhall - Chesternut seizure definition to the undisputed facts and determined that Respondent was detained**

On April 18, 1988, Officer Pertoso ran up Foothill Boulevard toward Respondent. Hodari D., who was also running, looked forward and saw the officer, clad in a blue jacket with the word "POLICE" on the front, running directly at him. J.A. 126, 127, 133. Pertoso cut off Respondent, confronted him head on and closed to within eleven feet. J.A. 134. Respondent looked startled. J.A. 128. He then discarded on the sidewalk the

single loose rock of cocaine that was later ordered suppressed. J.A. 128.[5]

Respondent's startling confrontation with Officer Pertoso made a lasting impression upon him.[6] Following the trial court's denial

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[5] Office McColgin was not far behind. Although the record is silent on this point, it is noteworthy that the previous Fall, (October 12, 1987) the same officer, Brian McColgin, of the Oakland Police Department Drug Task Force, choked another suspect charged with the same offense as Respondent. People v. Jones, 209 Cal.App.3d 725, 727-728 (1989). In Jones, the trial court's order suppressing the evidence obtained by McColgin's application of an illegal choke hold to Jones' throat was affirmed on appeal (Id. at 731) on April 13, 1989 by the same California Justices who later signed the opinion in this case. While in Jones the evidence was suppressed, it is fair to say that the word on the street in Oakland was not.

[6] Amicus United States incorrectly assumes, without citation to the record (Br. p. 19), that the Court of Appeal suppressed the single rock Officer Pertoso saw Respondent discard **and** fifteen additional rocks subsequently located on the street after his arrest. While these fifteen rocks were admitted into evidence over Respondent's relevancy objection in

of the motion to suppress, it declined to accept Respondent's proffered admission that he possessed one rock of cocaine because he told the Court that Pertoso had threatened him, "just by his looks. He looked at (Respondent) real mean." Respondent stated that if he didn't admit in Court (to possessing the contraband), and if he was seen on the street again by Officer Pertoso, Pertoso "would be mad at (him)." J.A. 98.

On this record, the Court of Appeal correctly applied existing law, ruled that Respondent had been seized and wrote:

> We disagree with the trial court that there was no detention until the officer physically gained control of the suspect. This case involves more than a pursuit

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the trial court after the motion to suppress was denied (J.A. 96), their admissibility was not argued at the suppression hearing. J.A. 46-94. They were not suppressed by the Court of Appeal J.A. 140-144. They too are not before the Court.

> as Officer Pertoso did not pursue, but ran in such a fashion as to cut him off and confront him head on. Under the rationale of Chesternut, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or 'otherwise control the direction or speed' of one's movement. (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980). J.A. 134.

Pertoso's intentional blocking of Respondent's chosen path of departure away from the police with the word "POLICE" prominently displayed in full view across his chest was assertive conduct intended as a substitute for speech.[7] See United States v. Ross, 321 F.2d 61, 69 (2d Cir. 1963). Display of the word "POLICE" at a distance of eleven feet, in this context, signifies the verbal

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[7] Pertoso's subjective intent to "find out who (the youths) were and what their purpose was for being ... in the area" (J.A. 44), is irrelevant. Pertoso did not even attempt to convey his intent to Respondent whom he confronted. Chesternut, 108 S.Ct. at 1980 n.7.

command: "STOP". This police action, although neither oral nor aural, communicates as clearly as a stop sign. Pertoso's conduct unmistakably conveyed his statement that Respondent was no longer free to continue on his way or to leave the officer's presence. This was a governmental termination of freedom of movement through means intentionally applied. Brower v. City of Inyo, 109 S.Ct. at 1381 (dictum).

Just as raising one's umbrella communicates to all within view, the statement: "It is raining," regardless of the actor's actual subjective intent, Pertoso's intentional blocking of Respondent's exit expressed the command to stop as clearly and effectively as spoken words, or red lights or a siren on a police patrol car do. See Kibbe v. Springfield, 777 F.2d 801, 802-803 (1st Cir. 1985), cert. dism'd., 480 U.S. 257

(1987). The latter universally denote that one's present freedom of movement, in one's chosen direction and at one's desired speed, has been unilaterally rescinded, effective immediately, by the non-verbal assertion of official authority.

Pertoso's threatening conduct was coercive and intimidating both in the field and in court. The necessary and sufficient conditions for a "seizure" were satisfied. In this situation, no minor on an Oakland street at night could reasonably feel that he was free to leave the officer's presence and continue on his way. See Chesternut, 108 S.Ct. at 576 (quoting INS v. Delgado, supra, 466 U.S. at 216).

III.

RESPONDENT'S ABANDONMENT OF THE COCAINE WAS DIRECTLY CAUSED BY THE UNREASONABLE POLICE CONDUCT.

Amicus relies on Respondent's arguments. We write here only to correct one fallacy in amicus, United States' brief.

United States reasons that if the seizure occurs at the time the officers first illegally and unsuccessfully order the individual to stop the evidence ultimately obtained will be suppressed "even if the events that occur between the time of the officers' command to stop and the eventual apprehension of the individual give the officers ample justification for the seizure." Br. p. 6. This conclusion is invalid. The outcome depends on the source of the "justification for the seizure" and whether the taint of the initial unlawful conduct was

attenuated by an intervening act including one by the suspect himself. Wong Sun v. United States, 371 U.S. 471, 486-488 (1963); Brown v. Illinois, 422 U.S. 590, 603-604 (1975). Here, there was simply no time for attentuation.

CONCLUSION

The judgment of the Court of Appeal of the State of California, First Appellate District should be affirmed.

December, 1990 Respectfully submitted.

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